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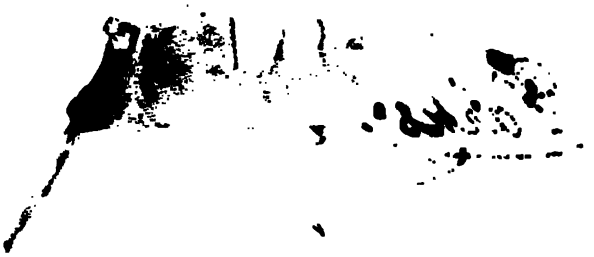

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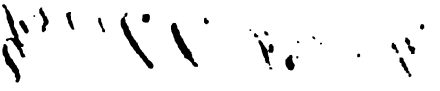
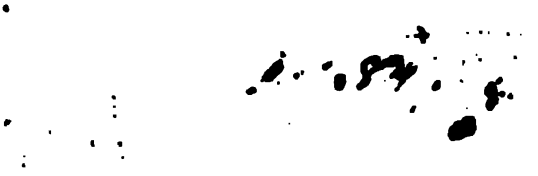




A

GENERAL ABRIDGMENT

AND

DIGEST OF AMERICAN LAW,

WITH OCCASIONAL

Notes and Comments.

BY NATHAN DANE, LL. D.
COUNSELLOR AT LAW.

VOL. IX.

BOSTON:
HILLIARD, GRAY, LITTLE, AND WILKINS.

1829.

VI. 4050

DISTRICT OF MASSACHUSETTS, ss.

BE IT REMEMBERED, that on the twenty-fifth day of July, A. D. 1829, in the fifty-... Independence of the United States of America, Nathan Dane, of the said district, has deposit... office the title of a book, the right whereof he claims as Author, in the words following, to wit:

'A General Abridgment and Digest of American Law, with occasional Notes and Comments. By Nathan Dane, LL. D. Counsellor at Law. Volume Ninth.'

In conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act, entitled 'An act supplementary to an act, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS,
Clerk of the District of Massachusetts.

OCT 14 1916

PREFACE TO THE NINTH VOLUME.

The cases added will be a few select American decisions made, and laws enacted, before 1820, and, generally, those decided and enacted since, American and foreign; in both cases the marginal references to cases of any age, as they may apply, will be added. In the work, as first published, there is as much foreign law, and for the most part, as much American law, found in existence in 1820, as is consistent with the plan of this work. The law published since 1820, is the most authentic and useful, being the latest; and of it, of the highest authority, there is not a small quantity, and that too decided and enacted by the courts and legislatures having final jurisdiction on the subjects on which they act.

As the work in its origin was the first of the kind in America, it was, in the outset, often necessary to introduce into it legal history and explanations, discussion, and reasoning. This course is now become less necessary, and need not frequently be adopted.

As American law, especially in print, is vastly increased since this work was originally and mainly formed, now and in future there ought to be included in it a much greater proportion of late American, and much less of English law; more especially as eminent judges and lawyers in the United States very justly hold English decisions, made since the United States became independent, not to be binding authorities in them, and not being such, they are but the opinions of eminent judges and chancellors, as may be thousands in other nations; however, the English decisions are very often on the principles, and often on the very words of our own laws, these and those of England being in many cases the same; also it is thus the superiority of the English over the American decisions is rapidly passing away.

Since this work went to the press, I have reviewed the new Commercial Code of France, and the English and our laws, on the same subject. In many cases in this code I find precision and certainty, where, in the English and our laws, I find the opposite character. I have, therefore, added a small selection from this code in cases in which it highly merits

attention; and I can say, with those who say there is a moral excellency in the whole code, it has 'a sacred regard for private property and public order. It enjoins the faithful performance of contracts, ordains the prompt administration of justice, and requires the unsullied purity of the mercantile character.' As to its severe treatment of insolvents and bankrupts, and the rights allowed to married women, we are to consider they are calculated for France, are the old French law improved, and are not calculated for Federal America.

This ninth volume is made up almost entirely of decisions in law and equity, American and English, made in supreme courts within the last nine years, and is taken from more than thirty volumes, among others, of the latest reports of which there is no other abridgment. The author has found no occasion to add any new chapters, and but very few new articles; hence the parts of this ninth volume are almost invariably additions to the articles and sections in the eight volumes. In the eight volumes, the author copiously included ancient law, because now found in but few law libraries, and yet is law, and a large portion of Maine and Massachusetts law. He, in this additional volume, has found room to include a larger portion of the laws of other States in the Union, as far as judicial decisions have been reported. After all, as formerly observed, the enactment of near thirty legislatures, and the decisions of as many supreme courts, are so extremely numerous in nine years only, that a large volume can be but a mere sketch of them; and this with a view mainly to show the spirit and principles of the laws in our several States. As the union of our States, on republican principles, is the first object, and the sameness of leading principles throughout the whole, are essential to that union, the author often takes occasion to notice and enforce those principles; and, of course, to select largely from those laws and constitutions best calculated to bind the States together *on federal and republican principles*. He can hardly realize that one sister State in this Union ought to view another as a *foreign* State. In this ninth volume, as in the others, the more important cases are abridged, the less important are often only digested. In it are a suitable index and table of cases, but no table of contents; as, to most of the matter in it, the table of contents in the first volume applies.

This volume is formed so as to be used by itself, but to the best advantage with the other eight, as each part in it is in continuation of the corresponding part in them, and to them expressly refers in each case; and in them all the heads of the law were so included, that it has been found necessary to introduce but one new one in this volume.

A

General Abridgment

OF

AMERICAN LAW.

CHAPTER I.

CONTRACTS AND CONSIDERATIONS.

§ 1 *Continued.* See Art. 54, this chapter. This subject, as to *impairing the obligation of contracts*, continued on new and late authorities, in which eminent judges have differed as to what constitutes the *binding force* or *obligation* of contracts made in society; hence, when do State legislatures impair them or not. The latest decision is this, a State legislature impairs a contract when it enacts a law affecting it *after* it is made; otherwise, if the contract is made *after* the law is enacted, for then the parties know the law, and make their contract subject to it. See a. 2, s. 5 con. ART. 1. *Continued.*

§ 2 *Con.* The legality or illegality, as well as construction of contracts, must depend on the *lex loci* where executed, unless it appears from the contract itself, that it was the understanding of the parties that it was to be executed elsewhere, page 142, a sound price requires a sound commodity. This is the rule of the *civil* law adopted in South Carolina and some other States, but not in a majority of these. ART. 2. *Con.* 1 Nott and M'Cord, 172—177.

§ 5. A. D. 1828. *Impairing contracts.* It will be observed that the article in the territorial ordinance, makes provision that no law shall be passed that shall *affect* private contracts *previously* made; that is, contracts made *before* the passage of the law, not those made *after*. This provision does not contain the distinction between a *contract* and its *obligation*. It is a matter of history, that pernicious tender laws had been made in most

I. Ch. 1. *Art.* 2. *Continued.*

of the thirteen States before July, 1787, empowering the debtor to tender depreciated paper money, pine barren lands, and other property of little value, in discharge of his debt and contract. These gave rise to this provision. This enormous evil was in each of these laws, in general; so discharging debts and contracts made *before* it was enacted, as well as those made *after*. As this was a new provision of the kind, it was thought best not to extend it further than that evil required.

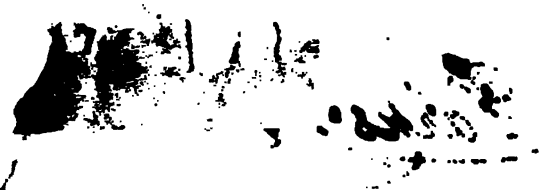
It will also be observed, a similar provision in principle, in the 1st article and 10th section of the federal constitution, is very general, which is, that 'No law shall be passed impairing the obligation of contracts.' This differs from the ordinance in two material points; one, this section makes the distinction between the *contract* and its *obligation;* the other, it does not make the distinction between contracts made *before* and *after* the passage of the law. Every day this provision in this 10th section is becoming very important; already discussions and opinions have grown out of it, that fill hundreds of pages. It is desirable to learn, if possible, why the Federal convention distinguished between the *contract* and its obligation, and why it did not distinguish between contracts made *before*, and those made *after*, the enactment of the law, meant to be inhibited. It is believed the public records can throw some light on this interesting subject. The Federal convention sat in Philadelphia from May to September 17th, 1787, and was in session there when this ordinance was passed in New York, and made public in July that year. The members of the convention saw it, no doubt, in that month. It is stated, that the first draft of this 10th section omitted this provision as to impairing the obligation of contracts, and that in an after draft it was inserted. Is it not the fair inference that the provision in the ordinance gave rise to that in the constitution? Might not the Federal convention well think it was best to look to *the obligation* of contracts rather than to the *contracts?* as *this obligation* and *binding force* of contracts, in its true and broad sense, is founded in reason and conscience, in moral principle, in men's intuitive perceptions, and in natural law, as well as in the municipal, of course universal; and because the obligation exists only in *valid* contracts, is a single universal principle in all valid contracts; hence expressed in the *singular* number, though properly the binding force of contracts in the plural; whereas numerous contracts exist *de facto*, which are void in law and even in equity, so in which there is no binding force or obligation, natural, civil, or municipal, in conscience or on moral principles; as usurious contracts, and thousands in fact made, but obtained by fraud or deception, or of persons incapable of contracting, or without consideration, &c. Might not the convention well think many

12 Wheat. 218.

contracts are made in society, the performance whereof is never enforced in courts of law or of equity, on *municipal* obligation merely; as when a contract is made in one nation and its performance enforced in another. For instance, A of London and B of Boston meet in China, do business there, and A, getting fairly in debt to B in $1000, gives him a note for that sum, to pay on demand; no place of payment is named; they meet in New York; B there sues A; the contract appears a fair one, for value received; what court in law or equity in that State, or any other, would ever think of even attempting to compel performance on the *municipal* law of China, as constituting its binding force or obligation, or even to inquire after that municipal law? When, too, it is probable that neither China or any other nation ever enacted a law to give binding force to such a contract, or thought to distrust its natural, inherent, intrinsic obligation, far more permanent, universal, and invariable than human legislation or law enacted. In fact the *civil* or *municipal* obligation is a *human* work; the *natural* one is a divine work. Might not the convention well mean so to establish this constitutionally, as that it should never be impaired by State enacted law, which had done but little for several years, but wrong creditors and favor debtors, men whose habits or management too often make them embarrassed debtors, defending themselves, and defended, under the compassionate plea of the unfortunate, not often a plea for the creditor.

As to the other distinction, might not the convention well think the restraint too limited, if confined to contracts *previously* made, that is, to those only made *before* the passage of the insolvent or other impairing law, as it was clear such contracts would soon be very few; for instance, a State passed an insolvent act *before* or when the convention was sitting, as some States did, to restrain such act to the contracts made *before* it was passed, these obviously in a few years would be performed, outlawed, or otherwise cease to exist in any number deserving notice, much less such a solemn constitutional provision. Therefore the convention omitted the distinction, *previously*, made in the ordinance; and provided the whole American people might establish forever the *natural* obligation of contracts founded in the correct moral law of mankind, not merely the *municipal* or *enacted* obligation, that could so easily and almost entirely be modified by State legislatures. Admit the correct legislation of the State generally, still, if there be but one bad legislation in fifty, such a constitutional restraint on that is necessary and proper.

§ 6. 'All contracts must be good, or valid, at their original creation, and must not depend on subsequent contingencies. The law will not suffer a gratuitous act of kindness or benevo-



Fred. C. Nash.

I. Ch. 1. *Art.* 7. *Con.*

adjudged bad; but a plea of this act of limitation of Massachusetts may be good. In this case the principles of the *lex fori* were discussed and examined at large, and scores of authorities cited.

1 Hop. Ch. R. 436—450. 530, 551.

§ 41 *Con.* Equity never compels a conveyance of a doubtful title; and the chancellor says, the equitable jurisdiction is 'not to make or to vary contracts, but to carry them into effect, and to do substantial justice between the parties by measures and methods of relief, which the courts of law do not afford.' This was an ordinary contract for the sale of lands, part paid, notes given for the balance. Vendor made and delivered his deed as an *escrow*, and retained the title till paid. *Performance* decreed on terms after long delay. He added, 'It is a rule of equity, that when time is not of the essence of a contract, and just compensation may be made for delay, the party omitting to perform at the time appointed, shall not forfeit his rights, but shall have relief upon terms of indemnity to the other party.' Terms, usually, payment with interest and all equitable costs. There are numerous authorities to support these general principles.

Leggett v. Edwards & al.

1 Jacob & W. 36—38.

Specific performance decreed without costs, the abstract delivered not containing a satisfactory title; and p. 263: P. 74. if trustees make an agreement by mistake, to sell for an inadequate consideration, the court will not compel them to perform: P. 422, the motive inducing a party to enter into a contract is not to be considered, unless in the contract itself expressed: P. 569. in compelling a purchaser to take a title, the court formerly acted on its own opinion, but now it will not compel him to take it if the point be doubtful.

§ 52. *A contract tainted in part by misrepresentation is void in toto:* As where A obtains an agreement by a partial misrepresentation, he is not entitled to a specific performance on waiving the tainted part—the effect is not to modify the agreement *pro tanto*, but destroys it entirely.

1 Jacob & W. 112–121, Clermont v. Tasburgh.

1 Jacob & W. 370, 371.

Equity does not interfere in every breach of contract, though a party may be entitled to large damages; cases of specific performance or irreparable damage excepted. 2. Courts of law and equity can only enforce the rights of parties under acts of parliament by applying their known rules and principles: if inadequate to that purpose, the legislature alone can supply the defect.

§ 53. *So a contract is void if the parties to it bind themselves to invade the rights of others.* As where the plts. owned nine sixteenths of a ship and were *managing* owners, by deed sold five sixteenths to the deft.: the plts. covenanted the deft. should be master of her, and he covenanted the plts. should continue managers and choose the tradesmen and appoint all

Ard & al. v. Hope, 2 Barn. & Cres. 661. 676.

officers, &c. These and such other covenants were made binding the parties (major owners) to act in a way to deprive the other owners of all control in managing the ship. Held, though the part of the covenant sued was in itself legal, yet the deed being thus illegal and void, the covenant sued was void also. The principle of this case, though often violated or disregarded, is a sound one, for when several persons own a portion of property, as a ship, &c. it is the right of all and each one that every one remain in a situation to act fairly and impartially and to exercise his best judgment, and of course not to bind himself voluntarily by his contracts so as to be thereby obliged to act otherwise, and so the court held the contract void, as being contrary to the interest of the other owners, and that no one of the concerned is '*to fetter his judgment*,' not only as to part owners, but officers, seamen, and all concerned in the ship; also such contracts are against public policy.

I. Ch. I. *Art.* 7. *Con.*

§ 7. A promise made to three, on a consideration moving from them and a fourth person, is valid. 2. If a mere ideal danger, as to pay to one who has no legal claim, is the consideration of the promise, it is void.

Art. 8. *Con.*

3 Pick. R. 88–95, Cabot and others *v.* Haskins & al.

In a deed, when the good consideration can be separated from the bad, the court will do it; and evidence *dehors* may be applied. Cited Collins *v.* Blantern, and other cases.

3 Rand. 12.

A moral duty is the ground of an actual promise. 2 Nott & Mc Cord, 45, 65, 153.

§ 1. *Con.* So the suspension or waiver of a legal right at the request of another person, is a good consideration for his promise.

Art. 10. *Con.*

2 N. H. Rep. 97–102.

So giving up a bargain may be a valuable consideration, &c.

4 Barn. & Cres. 525–529, Price *v.* Seaman in error.

Assumpsit. The plt. stated he had agreed with J. E. to buy certain houses of him at a price named, and that the deft., in consideration the plt. would sell and give up to the deft. the said bargain, and suffer him to purchase, &c. promised to pay £40. Plt. averred he did give up, &c. and the deft. did purchase, &c., but had not paid the £40, &c. Verdict for the plt. and held it must be presumed, after verdict, that the bargain between the plt. and J. E. was in writing, and that the giving up, &c. was a sufficient consideration of the promise.

2 Bing. 437.–2 W. Bl. 820.–1 Ld. Raym. 662.

§ 3. *Defect of consideration how cured*, &c. If A convey land to B without consideration, the conveyance is not void as to creditors; if afterwards, B convey to C for a valuable consideration and without notice, the land passes to the *bonâ fide* purchaser as C is.

Art. 12. *Con.*

§ 4. If part of an entire contract be void under the statute of frauds, the whole is void. When the sheriff has sold the debtor's land, and before he gives the deed, though the naked fee remains in the debtor, he has no interest that can be a *con-*

I. Ch. 1. *Art.* 12. *Con.*

sideration of a contract. Hence if he, in that intermediate time, contract by *parol* to sell the land to A for a certain sum, the contract is void, and the sum not recoverable: 1. There is no consideration: 2. The case is within the statute of frauds. As to void in part, the court cited Lord Lexington *v.* Clarke and wife, 2 Ventris, 223. She promised to pay £260: £160 was the debt of *another*, £100 her own; her promise was not in writing, so void as to the £160 by the statute of frauds, hence void *in toto*.

Van Alstine *v.* Wimple, 5 Cowen, 162, 165.

Miller *v.* Watson, 5 Cowen, 195–197.

§ 5. A buys land of B *with warranty*, and pays him the price. B confesses the title fails, and promises to repay the same, &c. A cannot have *assumpsit* therefor, but must sue on the covenant, there being no eviction, there is no consideration for the promise: 2. When a debt is secured by *deed* or record, a promise to pay is void. The deed contained no covenant but that of warranty on which no action lies without eviction. So no obligation to pay when he made the promise, and if then bound to pay, he was bound by *deed*, and when bound by deed to pay or perform, he cannot be bound to do the same thing by parol or simple contract.

Art. 17. *Con.*

§ 1. *Con.* *A mere voluntary courtesy* is not a consideration to support a promise unless moved by the deft's. request, and the request be pursued. Much less can I do one a favour and charge him against his will, and especially if he dissent.

1 Hop. Ch. Rep. 107-112. —2 John's R. 28.

§ 2. *Con.* No action lies in the father's lifetime for the son's services; but *it seems* if he dies without providing in his will for the plt. he may be entitled to a *quantem meruit* for his services after his father's death; son being of age, when he did the work and so entitled to his earnings.

13 Johns. R. 379.

Art. 22. *Con.*

§ 1. *Con.* An infant under twenty one years of age is not bound by a contract of marriage; but it seems it is only *voidable*, hence he may sue the other party if of age, &c. 5 Cowen, 475, 471, Hunt *v.* Peake.

Art. 25. *Con.*

§ 1. *Con.* Held, on much consideration, a promise to pay the debt of another, in writing by him who means to be bound, is a sufficient compliance with the statute of frauds, though the consideration on which the promise is founded, is not recited in the writing. See also ch. 9, a. 20. 33; ch. 11. a. 13. 5, 6, 7. Vol. I.

17 Mass. R. 122–144, Richard *v.* Richardson & al.

2 Barn. & Cres. 573–579.

§ 4. Debt on bond. This case proves where the first foundation of a contract is illegal, as stock jobbing, &c. remote contracts thence arising are also illegal and void; as, in this case, the deft's. agent in stock jobbing, incurred a debt of £500, and gave his note, and being threatened to be sued on it, gave the bond in question. Held illegal and void.

Art. 25. *Con.*

§ 5. *Con.* *Assumpsit* by Toler *v.* Armstrong for money duties, Toler paid as surety on account of goods of Armstrong and

others, *consigned to Toler*, and seised and libelled in the District Court of Maine in 1814, as having been imported contrary to law. Judgment for Toler. Held, a contract growing immediately out of, and connected with, an illegal and immoral act, was not to be enforced by a court of justice. 2. So if it be only such in part, and a new contract, if tainted with the old taint. 3. Otherwise of a contract entirely distinct and with a new consideration, though known to him to whom made, and though he contrive and conduct the illegal acts, as importing goods from an enemy's country of his own in time of war. The goods were condemned, and Toler paid the appraised value, and sued to recover back the money. Near one hundred cases cited, most of them to be found in this work. The court cited Faikney *v.* Reynous; Petrie, ex'r. *v.* Hannay, &c.: see these cases ch. 9. a. 16. 1. Vol. 1. Court also cited Farmer *v.* Russell. See ch. 9. a. 10. 5, and Clugas *v.* Penaluna, ch. 9. a. 16. 6. and Steers *v.* Lashley, ch. 9. a. 16. 2, and Booth *v.* Hodgson, ch. 9. a. 16. 3. Chief Justice Marshall critically examined these cases, also the case before the court. See many more such cases in this work, especially in ch. 9., and more especially in articles 10 and 16. The result of all seems to be thus: 1. If A be concerned in an *illegal* transaction, as smuggling, and B by act, consent, or connivance, &c. any way take a part in it, and then advance to, or pay money for A, as the duties, &c. B cannot recover. 2. If B do not so take a part, or participate, in the *illegal part* of the transaction, or do, or say anything to encourage or promote it; but *after* the illegal part is terminated, and independent of it, and on a *new* consideration, B advance to, or pay monies for A, or becomes his surety, as for duties on goods, A of himself alone had smuggled, &c. B may recover from A. The same principles apply as to immoral acts or transactions.

11 Wheat. 257-259, Armstrong plt. in error *v.* Toler.

ART. 31. *Con.*

§ 2. *Con.* A promissory note, for value received, was made in favour of a child nine years old. The payee sued the maker's executors: no evidence of consideration was given. The judge told the jury that the note being for value received imported that a good consideration existed; and that gratitude to the infant's father or affection to the child would suffice. Held, though the jury might have presumed a good consideration was given, yet those the judge named were insufficient, and a new trial was granted.

5 Barn. & Cres. 501.

5 Pick. 295-296.

§ 3. An officer attaches goods and delivers them to a bailee, and neglects to demand on execution till after his lien is gone, the bailee refuses to deliver them: the officer sues him, and pending the action the attaching creditor agrees to indemnify the officer, &c. who had sued at his request: the creditor's agreement is without consideration.

I. Ch. 1. *Art.* 31. *Con.*

5 Pick. 380–389, Train *v.* Gold.

§ 4. *Assumpsit* by a deputy sheriff on a contract of indemnity, by which the deft., an attorney, agreed that A of New York should save the plt. harmless in levying an execution against F, in favor of P, on certain goods pointed out by A as F's property, according to the terms of an engagement from A to the plt. The attorney's promise was in a letter. One Touro recovered the goods of the officer. The officer sued the attorney, and held, 1. his promise was founded on a sufficient consideration: 2. The officer's acquiescence was enough, without notice he accepted the promise, &c. and without calling on A for further security: 3. Without notice to A of T's action, the judgment was *primâ facie* evidence of T's right to recover and of the amount, &c., and with notice it was conclusive, there being no fraud in the case; and before Touro sued, A was informed he claimed the goods.

Art. 35. *Con.*

§ 2. *Con.* The same principles continued as in the section to which this case is added. 5 Ves. Jr. 287.

Art. 41. *Con.*

5 Pick. 228–230, Bryant *v.* Goodnow.

§ 5. *Con.* Where the agent of a company, not incorporated, may sue a subscriber, on his subscription for monies the agent has paid for him. The project was to establish a line of stages, lawful and deemed beneficial. The deft. subscribed $25: the plt. advanced the money on the credit of the deft's. subscription, and recovered, the monies he expended under the direction of the company were to a large amount so that the deft's. part thereof was as much as $25. It seems by this case that each subscriber was liable for his part of the whole sum expended by the agent. It was said the deft. was entitled to notice of the meeting at which the plt. was chosen agent and so directed; but it appeared he had waived his objection to the want of notice by offering to pay in a certain manner.

Art. 42. *Con.*

3 Pick. 452–461, Knapp admr. of Dilloway *v.* Lee.

§ 8. But if the grantor be *insolvent* the case may be different; as where W. S. Skinner obtained an estate of one Somes' by fraud, and sold it to W. R. Lee (deft.) with covenants of seisin and warranty. Lee gave several notes to Skinner, and entered and was evicted by Somes' guardian. Skinner endorsed one of the notes, $1000, to Dilloway, plt's. intestate, who was informed Lee would refuse to pay, if his title failed. So D stood in the place of P. W. S. Skinner died *insolvent*. Judgment for Lee on his defence on the general issue, as he could not plead the demand on the covenants by way of set-off, nor avail himself of it in a cross action; and in such a case the plt. may prove the value of the land, at the time of the eviction, was less than the amount of the note. Any notice to the indorsee was sufficient, that was sufficient to put him on his guard when the note was endorsed to him. In Little *v.* Roberts, Little was a man of property and able to defend his warranty. Lloyd *v.* Jewell, 1 Greenl. 352, seems contrary to Knapp *v.* Lee. See 11 Johns. 50, Frisbee *v.* Hoffnagle.

§ 2. *Con.* Trover for three hundred barrels of beef. The same principles. See *Insolvency.* That is, if A be insolvent, and his creditors agree to take 5*s.* in the pound, and no funds be provided to pay this proportion, their old contracts are not discharged. 3 Pick. 38–46, Chapman & al. *v.* Searle, adm'r.

Part of this case ch. 39. a. 9. s. 8. and a. 2. s. 5 to 10. The general principle asserted by the four judges seems to be, that when individuals *in society* make contracts, there is no *natural* obligation in them, attached to or impressed on them by the law of *nature*, or universal law, but instead thereof the municipal law creates in them a *civil* obligation, and this creature of the law the state can modify as it pleases as to contracts made *after* the law is passed. *How* this is done the counsel and judges who argued for Ogden did not agree. Marshall, C. J. speaking for himself and Duval and Story, justices, said, 12 Wheat. 338, 'the plt. (Ogden) insists that the law enters into the contract so completely as to become a constituent part of it.' Thompson, J. said, 'the parties must be understood as making their contracts with reference to existing laws, impliedly assenting that such contracts are to be construed, governed, and controlled by such laws.' Trimble, J. said, 'the law of the state, although it constitutes the obligation of the contract, is no part of the contract itself; nor is the constitution a part of the law of the contract.' On these points Marshall, C. J. speaking as above, said, p. 339, if the insolvent law is unconstitutional it is incapable of becoming a part of the contract. It is not correct to introduce into the contract a stipulation not admitted by the parties. 'If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act then declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions.' P. 342, &c. 'usage is made a part of the contract, not by the interference of the legislature, but by the acts of the parties'— 'the principle is, that laws act upon a contract, not that they enter into it, and become a stipulation of the parties. Society affords a remedy for breach of contract. If that remedy has been applied, the claim to it has been extinguished; the external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power.' 'If the law become a part of the contract, change of place could not expunge the condition; a contract made in New York would be the same in any other State as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate.'

I. Ch. 1. *Art.* 45. *Con.*

Trimble, J. said, p. 321, &c. 'that so far as related to private contracts, it is the *civil* obligation of contracts, that obligation which is recognised by, and results from the law of the State in which the contract is made, which is within the meaning of the constitution. If so, it follows that the States have since the adoption of the constitution the authority to prescribe and declare by their laws *prospectively* what shall be the obligation of all contracts made within them.' 'In a sovereign state there is no obligation of a contract, but that the *civil*, the municipal law creates and enforces.' P. 325, 'the obligation of contracts in the sense of the constitution, consists not in the contract itself, but in a superior external force, controlling the conduct of the parties in relation to the contract; and that superior external force, is the law of the State, either tacitly or expressly recognising the contract and furnishing means whereby to make it be enforced.' It is this 'which binds the man to perform his engagement.' P. 302, Thompson, J. noticed the court in Sturges *v.* Crowningshield, said, 'a contract is an agreement in which a party undertakes to do or not to do a particular act. *The law binds him to perform his undertaking*, and this is of course the obligation of his contract;' that is, says Thompson, J. 'as I understand, *the law of the contract forms* its obligation.' He thinks as the insolvent law looks to the insolvency of the debtor, &c. so do the parties. Cites said ordinance as cited art. 2. s. 4. above, and thinks it makes the true distinction as to *retrospective* and prospective contracts.

Trimble, J. cites the Institutes of Justinian, lib. 3. tit. 4. 'an obligation is the *chain of the law* by which we are necessarily bound to make some payment according to the law of the land.' So Pothier calls it '*vinculum legis*.' The C. J., speaking as above, says 'it is not true, we think, that contracts are entered into in contemplation of the insolvency of the obligor.' Insolvency is never expected; if it be suspected, security is commonly taken.' Clearly 'law may act on contracts, though it does not enter into them, or become a part of the argreement.'

In all this critical discussion in defence of State, insolvent, and other laws impairing, or that may impair, the obligation of contracts, there is an unusal degree of misconception; and it is in conceiving that a private contract made in society is a mere creature, solely and exclusively a creature, of State legislative enactments, and so shown to be by the opinions of the three judges, given by the C. J. in answer to the opinions of the four judges. In '*the chain of the law*,' in 'the law of the land,' in the '*vinculum legis*,' so in the said words in Sturgis, &c., 'the law binds him to perform,' &c. may well be included more than mere legislative enactments; these exclude the binding force of reason and conscience, of moral principle and duty, as

well as what we call the law of nature; there is too an intuitive perception in every man, that men in society are bound to perform their contracts independent of such enactments. If there be no binding force in a contract made in society, but the mere statute, mere legal enactment, what has conscience and equity to do with it. Such a contract can be proper only in courts of law. In numerous instances in society, men hold the plt. *in equity and good conscience*, has a just claim to have something of the deft., and that the law raises in the deft. a promise (contract) to render that something; what law? statute law or enactment? by no means, but the law, or reason and conscience, as operating in the human mind, and intuitively, so in *society* as in a state of nature; and it is this moral, this intuitive principle and perception, that is the essence of the obligation of contracts.

CHAPTER II.

REMEDIES BY THE ACTS OF THE PARTIES.

ART. 5.

§ 7 *Con. Damage feasant.* Trespass for taking and carrying away the plt's. sheep. Held by the statute of Maine of 1821, ch. 126, sec. 9, the right to sell beasts taken damage feasant, is given only in cases where the injury was done to lands 'inclosed with a legal and sufficient fence.' As to many remedies by the acts of the parties, see Accord and Satisfaction, Arbitration, Award, Distraining, Replevin, &c.

Heath v. Richer and another, 2 Greenl. 408—410.

ART. 6.

§ 6. *A note accepted, &c.* B, a debtor, gives his note, endorsed by A, as *further security* for a part of a debt; this the creditor accepts in full satisfaction of all demands. This note, so accepted, is a discharge of the whole debt, and may be pleaded in bar as an *accord and satisfaction.*

Boyd v. Hitchcock, 20 Johns. R. 76.

CHAPTER III.

OF ACTIONS GENERALLY.

ART. 1. *Con.*

§ 5. Trover for a horse; one deft. was defaulted; Thwing, a minor, defended by guardian. Held a minor, who hires a horse to go to a place agreed, but goes to another place in a different direction, is liable in trover for an unlawful conversion of the horse.

3 Pick. 492—495, Homer v. Thwing & al.

§ 6. *No action for tort lies for damages occasioned under a statute, and that providing a special remedy.* As where the legislature of New Hampshire, by an act of incorporation, authorized a dam to be built across Connecticut river, at White

I. Ch. 3. *Art.* 1. *Con.*

River Falls, and prescribed the method in which damages, thereby occasioned, should be ascertained; and the deft., in erecting the dam, caused damage to the town of Lebanon to the amount, as stated, of $650, by flowing a highway, &c. Held, that no action lay, and judgment for the deft. If in such case the legislature provides no specific remedy to enforce payment of the damages; when ascertained, the debt lies. The plt. brought trespass on the case. The damage to the town was the expense of repairing the road overflowed, assessed in the mode prescribed at $240. As to debt, see ch. 143, a. 5 s. 18. Different decision in New York.

3 Johns. Ch. R. Cumberland v. Codrington. 229, 254—7, do. 57. Duncan v. Lyon, 3 Johns. Ch. R. 351.

§ 7. If A makes a promise to B, for the benefit of C, C may maintain an action at law on the promise. An action of account lies at law by one partner against another; and there is no good reason why that action is not resorted to instead of a bill in equity.

§ 8. An action of covenant lies at law by one partner against another, where, by the contract, there is a covenant to account. So *assumpsit* lies on a promise in writing by one partner, to take part of the goods bought, in which they were to be equally concerned as to profit and loss. Id.

§ 9. Whenever an injury is done to goods in the actual possession of a servant, carrier, or bailee, if the owner have the immediate right of possession, he may, for such injury, sue in his own name.

White v. Morris, 1 Hawks. 301.

§ 10. A sells a tract of land to B as containing two hundred acres. It is not described by metes and bounds, nor by any visible or known marks, and the number of acres can be found but by actual survey; if there be any considerable deficiency, B has his action therefor.

Talbot v. Mason, 2 M'Cord, 440.

§ 11. A buys an article of B, and pays him for it; the article fails; A, to recover back the price, must first return or tender the article. 2. This is not necessary to enable A to recover on the *warranty*. 3. This rule relates as well to *implied* as to *express* warranties. 4. In an action on the warranty of title to *real* or *personal* estate, the measure of damages is the price paid for the property, with interest from the time of the purchase. This, as to *real* estate, is not the rule generally, see ch. 115; though it seems to prevail in the slave-holding States, where a large part of the property, *personal* in fact, is made *real* by statute law, that is, their numerous slaves.

2 M'Cord, 432.

2 M'Cord, 413.

§ 12. A sells a horse to B for $50, and takes C's note for that sum. This is payment, and if it turns out A had no title, B has *assumpsit* for money had and received to recover of A $50 and interest. 2. This is the proper form of action, where there is a warranty of title express or implied in the sale of a chattel; and in which a warranty of title is implied. Such note

11 Johns. 409.

is payment. *Assumpsit*, the proper form of action, 6 Johns. 168; warranty of title implied, 1 Johns. 274; 3 Cowen, 272, 280, Read *v.* Barber.

§ 13. When a merchant abroad accepts my order for goods, without any directions from me how to pack and secure them in the vessel, he is liable to my action if he, in shipping them, neglect to pack and secure them in the *usual* and *customary* manner, and by such neglect the goods are injured. Dickey *v.* Grant and others, 6 Cowen's R. 310—112.

§ 14. *Assumpsit* for money on agreement to pay for land, &c. Held, 1. If A contract to pay for land and receive a conveyance of it of B, and pays part, before any conveyance is made by B, A cannot rescind the contract, and sue for the purchase money and interest; but he must sue on the contract, as one still in force. 2. Where B agrees to convey land to A on his paying the price, A must tender or pay it; also demand a conveyance, and, after waiting a reasonable time for it to be made out, must present himself to receive it. The purchaser, to recover on the contract, must put the vendor or his heirs in default; to do this, by the English law, the vendor must prepare and tender a deed ready to be executed; on this last point, see Sugden's L. V. 181, 182, and cases cited, especially Baxter *v.* Lewes and Webb *v.* Battel. Fuller *v.* Hubbard and ux. adm'r. 6 Cowen, 13—22.

§ 12. *As to partners in trade, &c.* Held, if the creditor agree not to take the *separate* estate of one partner, he cannot sue the partnership debt. On judgment against the administrator of the surviving joint partner, it appeared Webster and Thatcher were such partners, indebted to the plts. They received of Thatcher $1410, his *separate* estate, and promised him, in writing, not to sue any process against him and Webster, by which the separate estate of Thatcher might be taken for the debt yet due from both, but only their *joint* property, and Webster's *separate* estate. Thatcher *died insolvent*. Held, also, this action could not be maintained. The agreement was specially pleaded, and averment Webster was alive and insolvent. General demurrer to this plea and joinder. This was not an action at common law, not barred by a promise merely in writing, but an action on Massachusetts statute of 1784, as to insolvent estates, and an appeal from the commissioners who rejected the claim. Art. 3. *Con.* 16 Mass. R. 24, 28, Sewall *v.* Sparrow, adm'r.

§ 13. Held, A, for a valuable consideration, promised to convey certain lands to B as soon as B should pay a certain sum, and A conveyed them to C; B may sue A presently, and need not pay, or tender the sum, on the general principle that A disabled himself to perform his part. 16 Mass. R. 161, 166, Newcom *v.* Brackett.

§ 14. Held, where A has B's note, and receives part payment, and omits to endorse it, and gets judgment for the whole note, B may sue A, and recover the sum so paid, though the judgment be not satisfied. 16 Mass. R. 306 308, Rowe *v.* Smith.

I. Ch. 4. *Art.* 1. *Con.*

16 Mass. R. 332—336, Musson & al. v. Fales and others.

§ 15. An owner of a vessel may be liable to an *enemy's* action, as where a United States' vessel went into his port, pretending to be *neutral*, and as such obtained credit of an *enemy* merchant there, for repairs and expenses of defending her in the admiralty, where condemned as *enemy's* property. After peace the foreign merchant recovered against the owners in *assumpsit* on an implied promise. This was a new case.

17 Mass. R. 247, 249, Kingman v. Pierce.

§ 16. Held, if the maker of a note pay it unfairly, and get possession of it, the owner has trover for it; as where the owner, the payee, going abroad, left the note with his son, and directed him not to receive payment in his absence, the maker insisted on payment though informed of the directions. The son received the money and delivered the note, not then due. Decision as above. A new trial was granted. The maker of the note had no right to the note till it became due. It is clear the payment of the money to the son had been valid, if he had been authorized to receive it, or if the plt. had received it after his return, from his son.

CHAPTER IV.

WHEN THE PLT. HAS A RIGHT OF ACTION AND OF WHAT KIND.

Art. 1. *Con.*

17 Mass. R. 237—239, Minor v. Walter.

§ 24. If A sue B, and credit him goods, but short of their full price, and obtain judgment, it is no bar to B's action for the goods.

17 Mass. R. 394—397.

§ 25. If A hold the written promise of B, and receive thereon partial payment, and omits to endorse them, and obtains judgment for the whole amount promised, *on trial*, B's remedy is a review of the action; but if made in confidence A would endorse them, then B may have *assumpsit* for money had and received for the amount of the said partial payments; as ch. 3, s. 14. See also 7 Mass. R. 14, ch. 9, a. 8, s. 5, vol. i.

4 Munf. 73, Monroe v. Webb's ex.

§ 26. An action lies for the plt. against the clerk of a court, for endorsing credit on an execution to the plt's. injury; but the declaration must charge that he made them as clerk without the plt's. privity or consent to his loss; also it must charge that such endorsements were made without the plt's. order or consent.

1 M'Cord, 121.

§ 27. When a new remedy is given by statute, the plt. must bring himself within it; and p. 181, he must strictly pursue it, and it must appear on the face of the proceedings that the plt's. case is such as to empower him to recover under the statute.

2 Const. R. 428.

§ 28. When the character of plt. and deft. meet in the same person, a suit at law cannot be maintained, though other interests may be implicated. The proper remedy is in equity.

2 Nott and M'Cord, 377, and M'Cord, 181.

When a deft. is unable to pay the gaol fees for his detention in prison, the sheriff has an action against the plt. for the amount.

§ 29. *Assumpsit* never lies for *stolen* goods; and no action before conviction; case in tort, may, in some instances, lie after conviction against the thief. See Simpson *v.* Gisling, Bul. N. P. 131; 3 Greenl. 458, 460.

§ 30. No action lies for one whose property has been attached, and who has suffered much damage in consequence of a civil action which was abated, unless the prosecution thereof be *malicious*. 17 Mass. R. 195, 197.

§ 31. *False certificate, how a ground of action.* As where a town clerk carelessly gave a false certificate to deft. attested a copy of record, in order to support his plea of infancy, by reason of which the plt. was obliged to continue his action to obtain a correct certificate to prove the deft. was of age when he bought the goods of the plt. who had attached sufficient, &c. In the mean time the deft. died insolvent, by which the plt. said he lost his attachment, &c. Held the town clerk was liable to pay the plt. for the damages occasioned by the delay and continuance of the action; 2. The only proof of the insolvency was a commission of insolvency issued, so as to dissolve the attachment; but as no commission had issued, the attachment was not dissolved; so no damages on that account. 2 Greenl. 8, 12.

§ 32. The plt. has no action for a breach of covenant where he has taken a note in satisfaction of the breach; and this bar is a good consideration for the note; Drake *v.* Mitchell, ch. 20, a. 20, s. 7; otherwise if not so accepted, Foster *v.* Allanson, ch. 52, a. 4, s. 5, Moravia *v.* Levy; a party has no action, though he has sustained damages, unless also some right has been infringed: Sic Utere, &c., ch. 58, a. 2, s. 17, many cases. 1 vol. 2 N. H. Rep. 171. Id. 534.

§ 33. A tenant tenders the amount of his rent, due to the lessor. After this he distrains the tenant's goods for the rent, he has an action on the case for an excessive distress. See rent, ch. 151, a. 4. 1 Barn. and Cres. 145.

§ 34. The plt. had adopted, as a manufacturer, a particular mark for his goods, to denote they were manufactured by him. The deft. adopted the same mark to denote that his goods were manufactured by the plt., and the deft. sold his goods, so marked, as and for goods manufactured by the plt. Held the plt. had a right of action against him. 3 Barn. and Cres. 541—543.

§ 35. If a factor or agent having sold his principal's goods, be ordered by him, while they are *in transitu*, not to deliver them to the buyer, his solvency being doubted; yet he delivers them, and demands no security, the principal has his action against the factor, if the buyer prove insolvent. 5 Munf. 34.

§ 36. No action at law will lie on the decretal order of a court of equity. The Circuit Court decided differently. 8 Wheat. 697.

I. Ch. 5. *Art.* 1. *Con.*

CHAPTER V.

WHEN THE PLT. HAS AN ELECTION IN ACTIONS, AND MAY IN SEVERAL CASES SUE EITHER.

Art. 1. *Con.*

1 N. H. Rep. 151—157, Chauncey & al. *v.* Yeaton.

§ 1 *Con.* 1. If the deft. *tortiously* converts to his use the plt's. goods, as when master of the plt's. ship, he earns freight, and then *wrongfully* sells her, and becomes liable in trover or trespass, the plt. may elect to waive the *tort*, and bring *assumpsit* for the freight earned, the amount of the sales and interest thereon. 2. As in this case the plt. waives the *tortious* conduct of the deft., and treats him as his *agent* and *bailee*, and so adopts his acts, the deft. must be allowed his reasonable demands as agent or bailee. 3. If the ship earn freight in an *illegal* voyage, as under an *enemy's license*, the plt., the owner, cannot recover her earnings; for to do this, he must consent to the illegal voyage, and participate in it.

P. 184—187. 1 M'Cord, 449.

§ 6 *Con.* If an account be liquidated, and a note given for the balance even of a third person, the creditor may sue on the note, or on the open account, at his election, unless the note be expressly received in payment of the balance.

2 Serg. and Rawle, 358.

If the evidence prove a trespass and conversion, the plt., if there be a count in trover, may waive the trespass and recover in trover.

Gilmer, 33. 1 M'Cord, 207.

An action by a father for debauching his daughter, may be trespass or case; so case or trespass for criminal conversation. Case the most proper action in the daughter's case above. 3 Serg. and R. 217, and see ch. 64, vol. ii.

17 Mass. R. 400—405, Arnold and al. *v.* Lyman.

§ 8 *Con.* A owes debts to B and others, and his estate is liable to them, &c. A conveys his property to C; he, in writing, engages to pay A's debts due to them, naming B, &c., and the sum. B has *assumpsit* for the amount A owes him against C; and 3 Cran. 495. See sect. 14 and Metcalf's Yelv. 25. many cases cited.

17 Mass. R. 575—581, Hall *v.* Marston.

§ 9 *Con.* Same principle, A owing B $1300 and C $400, A being abroad, remitted to B a bill of exchange for $1000, directing B, on receiving the contents, to pay C $200. B received the contents, but neglected to pay C, and gave him no notice. C recovered in *assumpsit* his part of the money.

§ 17. *Assumpsit* lies to recover an annuity given in a will, as 1 N. H. Rep. 217–232, Margaret Erickson *v.* Joseph Willard, was *assumpsit* and several counts, stated in substance that Sept. 1, 1806, one Elizabeth Twyman died testate, that the deft. was her sole devisee *under a condition* to pay the plts., from the income of the estate devised, the sum of fifty dollars annually during the plt's. life; that the deft. was sole executor of said Elizabeth, accepted the trusts, took possession of her estates, the income of which was more than sufficient to pay the above

annuity and that he thereby become liable, and in consideration thereof promised, &c. but had neglected the payment of it. Plea never promised, &c. This action was on a clause in said will by which the testatrix devised her estate to said J. W. and made him executor, and added her desire that the said Joseph Willard should, 'at his discretion, appropriate a part of the income of my estate aforesaid, not exceeding $50 dollars a year, to the support of the widow M. E. &c.' Held, said Willard was trustree to this amount, which trust a court of law could enforce. It being expressed as above, *at his discretion*, differed the case from the common case of a legacy or annuity *absolutely* given: no doubt it was for this reason the cause was viewed of so much importance, and scores of authorities were cited in it by the court and counsel. Willard was the minister of the testatrix and wrote her will, and the plt. was her neice and heir. The sum to be recovered (if anything) was agreed. The material question was, if the annuity was a *trust* or to be merely at Willard's discretion. Held, a *trust*, and the words 'at his discretion' applied merely to the *manner*, as did the same words as to the burial of the testatrix, to be buried '*at his discretion*,' could apply only to the manner; for she could not be supposed to leave it 'at his discretion' whether to bury her or not. The sum too was for her life and support. Not much objection to the action, *assumpsit*. The court noticed the opinion of Buller, J. who held a breach of trust was the ground of an *assumpsit*. In support of the *trust*, the opinion of Lord Eldon, 8 Ves. Jr. 380, Paul *v.* Compton, was relied on, where he said 'whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt; if the objects, with regard to whom such terms are used are certain, and the subjects of property to be given are also certain, the words are considered imperative and *create a trust*.' As to the action, the plt., it will be observed, grounded it on the deft's. liability to pay, and so his *promise to pay;* rather a common case, where there is no court of chancery, for to allow an action, especially *assumpsit*, to enforce a trust in a court of law; and the expression of the Supreme Judicial Court of Massachusetts, 1 Mass. R. 204, that it could not enforce a trust, is too general.

5 D. & E. 608, Smith *v.* Jameson.

See ch. 9. a. 8. 6.—Ch. 9. a. 3. 1.—Ch. 114. a. 13. 3. Vol. 4.

CHAPTER VI.

THE PLAINTIFF MUST WAIT TILL THE CAUSE OF ACTION IS ACCRUED, OR ACTIO NON ACCREVIT, CONSIDERED.

§ 4. *Con.* In an action against the representatives of *one* of *two joint obligors* in a bond, dated before the said statute of

I. Ch. 6. *Art.* 2. *Con.*

1786, it is necessary to state in the declaration, that that obligor survived his companion. 2 Munf. 49.

§ 8. A devise of real and personal estate to the testator's widow for life, then to trustees to be turned into money and divided among several persons named, and the survivors or survivor of them, those only take who survive the widow. And 2 Jacob & W. 278—286; 3 Ves. 233; 1 Swan. 161.

1 Jacob & W. 146.

§ 9. *Assumpsit* for money had and received by the deft. to the plt's. use, as administrator of B. A gave his note to B and C. B died, and *after* his death C received payment. B's administrator, the plt., recovered half of C. 2. Held, C could not set off claims he had against B's estate; his estate was *insolvent*. 3. As B had no cause of action against C, held further, B's administrator might have sued in *his own right*, though accountable to B's creditors, *as administrator*, for the money when recovered.

5 Pick. 15–17, Loring & al. v. Gurney.

§ 10. *Indebitatus assumpsit* for goods sold and delivered. Delivery was admitted. Defence, sold on credit that had not expired when the action was commenced. Two principles were allowed: 1. Where a promissory note payable on demand, with interest, after a limited time, will support an action brought before the time is expired. Hence, when goods are sold, &c. to be paid in such a note, if the vendee neglect to give it, the vendor may sue forthwith for the price. 2. The usage of an individual known to the person with whom he deals, may be proved, as tending to show what is their contract.

CHAPTER VII.

ACTIO PERSONALIS MORITUR CUM PERSONA: ACTIONS ON CONTRACTS SURVIVE, ON TORTS DIE WITH THE PARTIES.

Art. 1. *Con.*

§ 3. *Con.* An action on a promise of marriage broken by the intestate does not survive against his administrator. See ch. 29. a. 3. 2. The action was *assumpsit;* cited for the promisee, Yelv. 21; Plowd. 181; 9 Co. 86. b.; 2 Brownl. 137; W. Jones, 173; Cro. El. 552; Cowp. 371; 1 Saund. 216; Palm. 329; Sty. 158; Cro. J, 405–417; Rol. R. 266. Cited for the promisor, 2 M. & S. 415; Cowp. 372. b.; 1 Salk. 252; Carth. 153; 1 Saund. 216; 1 Vin. 176; 7 Mass. R. 52; 2 M. & S. 408; 1 M. & S. 364; 2 M. & S. 414; 14 East, 198; Pre. Ch. 105; 1 Eq. Ca. Abr. 149; 6 D. & E. 369; 5 B. & P. 365.

2 Pick. R. 527, Little v. Conant & al.

Debt for a penalty for cutting and carrying away trees of the plt. contrary to the stat. 1817, c. 173, abates by the plt's. death.

§ 6. *Con.* An action of trespass *quare clausam fregit* is not converted into an action *de bonis asportatis* by an allegation in a declaration, that trees cut *were carried away.* Hence this rule *actio personalis*, &c. applies to such an action; therefore, if the deft. die pending the suit, it abates, even if his administrator come in by consent. The Virginia statute, 1 Rev. Code, does not give to the executor an action like this, but only an action for *goods taken and carried away*, in the testator's lifetime. I. Ch. 7. *Art.* 1. *Con.* 3 Rand. 14-24, Harris v. Crenshaw.

§ 23. As to actions generally, one principle is well settled, that is, that no action will lie on a contract made in violation of a statute, or of a principle of the common law. 17 Mass. R. 281.

§ 24. *Assumpsit* on a joint and several note; one defaulted, the other may plead alone any matter proper to bar the action, but nothing that contradicts the note. Here one deft. plead an agreement purporting that on paying a less sum than was due from the other deft. on the note he was to be discharged; and he did pay the less sum, &c. Plea bad, as it directly contradicts the note. Plt. supported his action. The agreement at most not to sue one promisor is only a ground of action. 17 Mass. R. 623-629, Shed v. Pierce and Pierce. Ch. 101. a. 2. 22. Parker v. Elliott, 6 Munf. 587.—See 3 Wils. 18.—

§ 25. The father has this action in Virginia for the loss of his daughter's service and expenses incurred by him in consequence of her being debauched and having a child by the deft. when *no forcible injury* to himself or to his property is alleged in the declaration. 2 D. & E. 187. —6 East, 387. —See ch. 50. a. 6. Vol. 2.

§ 26. *Assumpsit* for money had and received lies where A purchased a land warrant, ignorant it was void, and sold it to B for a valuable consideration. Then it was adjudged void. B in this action recovered back the price. 1 Tennessee Rep. 438.

§ 27. An action on the case for diverting a water course dies with the plt. This action respected *real* estate, and the stat. 4 E. 3. ch. 7. is confined to *personal* estate. 5 Pick. 257-258, Holmes v. Moore & al.

CHAPTER VIII.

ACCOUNT.

§ 12. If the plt. go for a mere partnership account to be taken and settled, it is a proper case for a court of equity. 1 Const. R. 172; 1 Nott and Mc Cord, 587. Art. 1. *Con.*

§ 6. Where in an action of *debt* in Maryland, auditors are appointed on the statute 1785, ch. 80. s. 12. to audit accounts, there must be the same proceedings as in an action of accounts. This was an action of debt on a bond of a deputy sheriff to the sheriff, conditioned to perform certain duties specified as deputy sheriff and collector in a certain hundred specified in the sheriff's county. The court appointed auditors to audit accounts be- Art. 4. *Con.*

I. Ch. 8. Art. 4. *Con.*

tween the parties. Special pleadings and bills of exception. 4 Har. & Mc H. 65, Mantz *v.* Collins.

Pennsylvania Gratz *v.* Phillips, 5 Binn. 564.

§ 7. It seems the plt. may recover more damages than he declares for. P. 568. If he state in his declaration the value of the goods, also the damages, he has judgment for both—distinguishing each. If the deft. resist the plt's. claim by pleading, or a receiver receives an increase to merchandize, there is judgment for damages. But if, on the issue, never receiver, or bailiff, the jury assess damages, no judgment can be given for them.

CHAPTER IX.

ASSUMPSIT.

Art. 13. *Con.* 1 Greenl. 152–155.

§ 1. *Con.* A and B settle accounts, and by *mistake* B gives a note, $20 too large, for the balance: A may endorse this sum on the note and give B notice, and all is settled; but if A do not do so, B may have *assumpsit* for the $20, or referees may allow it.

Utica Bank *v.* Van Gierson, 18 John. R. 485.

Assumpsit for money had and received paid to the deft. by *mistake*, notice of it and demand of repayment before suing, are not necessary. The deft. is not bailee or trustee. But if notice and demand were necessary, putting a letter containing the same into the post office, directed to the deft. would be sufficient. Lies against two defts. only on their joint contract, or on their joint receipt of the money.

Manahan *v.* Gibbons, 19 Johns. R. 427.

Art. 5. *Con.*

§ 1. *Con.* If personal property be purchased the title to which fails, the consideration may be recovered back, unless benefit have been received from the purchase. 2 N. H. R. 61.

Hudson *v.* Swift, 20 Johns. R. 24.

But to entitle the purchaser of land to recover back part of the consideration paid, he must prove he has tendered the purchase money and demanded a deed, so as to put the vendor in default. *Quære*, if the purchaser must not form and tender a deed to be executed? *Usurious interest* recovered back by the borrower; this is on paying the principal and legal interest.

Wheaton *v.* Hibbard, 20 Johns. R. 290.

Art. 8. *Con.* Clark & al. *v.* Pinney, 6 Cowen, 299–301.

§ 1. *Con.* Judgment is recovered by A against B, and execution is taken out and the amount paid, and afterwards the judgment is reversed; B may recover back the money in an action for money had and received, though he may have his old remedy of *scire facias;* and if the judgment be paid in a note, and that is paid, it is the same thing; so if only endorsed satisfied. This case laboured, and cases were cited for and against. It is not easy to see why doubted. 8 John. 202; 11 Id. 464, &c.; Green *v.* Stone, 1 Har. & John. 405.

§ 7. *Assumpsit.* Held, though parties are reciprocally bound in a penalty in a deed to perform a contract, yet one of them may have *assumpsit* on a *subsequent transaction* distinct from the deed; as if, on a charter party, doubtfully expressed, too much freight be paid, the *surplus* may be recovered back in this action. 1 Nott & Mc Cord, 45, 63, Goddard *v.* Bulow. I. Ch. 8. *Art.* 8. *Con.*

§ 8. *Assumpsit* to recover back money paid for prime coffee, which turned out to be damaged. Held, the difference between prime coffee, and that of an inferior quality, could be recovered. 2. An action for money had and received, lies not to recover back the purchase money, when the property proves to be unsound, unless there has been a return or tender of it, or unless the consideration has wholly failed. 3. The plt. advertised as *prime* and *represented it as such at the sale* (auction). *If damaged*, he is liable for the deficiency to the buyer, though the seller expose the bags containing it, which the buyers have examined. A sample was shown, at the time of the sale, which was sound and good. See ch. 62. a. 1. 13. Vol. 2. 2 Nott & Mc Cord, 65, 68, Wharton *v.* O'Hara.

§ 1. *Con. In pari delicto.* Spencer brought an action against Wilson and Neal, in a county court, on a note under seal, given for the bills of a bank forbidden by statute. Defts. filed two pleas, specially stating the fact, and that the note was given to the president of an unchartered bank, so forbidden. To these pleas there was a general demurrer. Held: 1. A court of equity, as well as of law will prohibit the effects of contracts violating statutes enacted for the public good. 2. The principle *in pari delicto* does not apply to cases in which the acts are forbidden by positive statute law. 3. Persons taking such notes in payment may not be as culpable as the bank that issues them. 4. These principles apply as well to contracts prohibited under penalties, as to those expressly declared void by statutes. The county court gave judgment for the plt. So did the superior court: revised in the supreme court of appeals. Cited to show the note was void, Carth. 252; 1 Taun. 136; 1 Pow. on Con. 196, 199; 3 D. & E. 17, 454; 4 D. & E. 456; 5 D. & E. 599, 242; 5 Johns. 320; 4 Bos. & P. 264, 552; 11 East, 501; 3 Bos. & P. 38; 3 P. Wms. 391; Talbot, 140. So far the parties seemed to agree, but differed in the construction of three Virginia statutes on the subject. Art. 10. *Con.* 1 Rand. 76, 101, Wilson *v.* Spencer.

But *parol* evidence admitted to impeach evidence under seal, on the ground of fraud, *in pari delicto* does not apply when the policy of the law requires that a fraudulent or vicious conveyance be enforced. Hence, where a debtor makes a fraudulent conveyance of his property, to keep it from his creditors, the fraudulent grantee, though *particeps criminis*, may enforce such conveyance in a court of law, and the debtor will not be allowed to defeat the claim by proving the fraud. See Austin 4 Rand. 368-383.

I. Ch. 9. *Art.* 8. *Con.*

v. Winston, ch. 226. a. 18. s. 1. where a *particeps criminis* was relieved, but was a special case: generally, not relieved. Hawes *v.* Leader, Cro. Jam. 270, 271, the goods sold remained with the *grantor*, meaning to defraud his creditor, but was obliged to give them up to the buyer, for between him and the seller the sale and deed were valid. Same case, Yelv. 196; see ch. 32. a. 1. s. 9; ch. 226. a. 18. s. 1; Collins *v.* Blantern, ch. 144. a. 3. s. 15; 12 John. 306; 19 Id. 311.

Art. 11. *Con.*

§ 5. *Con.* The rule 8 Wheat. is, that it seems that a court of equity will relieve in a case of mistake of the *law* merely; but Eden, 7, 8, 9, after citing several cases, says, p. 8, we may now consider the maxim *ignorantia juris non excusat* as fully recognised in equity, as it has long been unquestionably established in civil cases at law. So seems to be the case in New York. 1 Johns. Ch. R. 516; 2 do. 51, 60, Lyon *v.* Richmond; 6 Johns. Ch. R. 166, Stors *v.* Barker.

If A gets my property and sells it, I may have *assumpsit* for the proceeds. 4 Pick. 449, 453; see art. 9. s. 1.

Art. 14. *Con.*

§ 4. *Con.* Similar principle, 1 Greenl. 352, 361, Lloyd *v.* Jewell & al. Many good reasons cited supported by many cases, and only Frisbie *v.* Hoffnagle, 11 John. 50, to the contrary.

2 Greenl. 390–392, Howard *v.* Whitman & al.

Assumpsit on two notes given for land conveyed by quit-claim deed, by the plt. to the deft. without covenant. It is no good defence, the plt. represented his estate to be in fee simple, when in fact it was only for life or years. There is no defence to such action but a total want of title. But 1 Mc Cord, 470, held, in *assumpsit*, on a promissory note, the deft., under the general issue, may prove it was given for the price of a tract of land, the boundaries of which were *fraudulently* represented by the vendor.

3 Pick. 207–212, Mills *v.* Wyman.

§ 9. *Con.* This position is limited to the cases in which a good or valuable consideration once existed. *Assumpsit* for the board, &c. of a sick and poor son, who had ceased to be one of his father's family; here is no ground for his express promise in a letter to pay the bill.

Art. 15. *Con.*

4 Pick. 444–448, Cornwall *v.* Gould.

§ 1. *Con.* At the deft's. request A signed a negotiable note to the plt., and he endorsed it, to be discounted at a bank, for the deft's. use, who promised to indemnify the plt. and the deft. received the money at the bank. Afterwards the plt. took up the note, by giving a negotiable note signed by himself, and endorsed by B. Held, 1. The plt's. claim was only against the deft. 2. Giving the new note was equivalent to payment of the first; so supported the plt's. action for money paid. 3. After verdict too late to object, the plt. paid the note without being duly notified as endorser. 4. Taking collateral security for indemnity did not prevent the plt. from resorting to an im-

plied promise, unless agreed he should confine himself to that security. 5. If the endorser of the second note should be compelled to pay it, he would have no demand on the deft. not appearing he endorsed it at the deft's. request.

§ 5. *Con.* Implied ratification by the principal of the agent's acts, extends only to such of them as the principal knows at the time. 3 Greenl. 429, 432, Thorndike *v.* Godfrey. Willes, 105.

And generally where a public office is created by statute, there is incident to the office an implied power to bring all suits which a proper discharge of his official duties require; as overseers of the poor, &c. 2. When a public agent or officer apparently acts in the line of his official duty, his contracts are public and not personal. 3. When the transactions show the promise or engagement to be on *public* account, the agent or officer need not expressly say he acts in his *public* character or *official* capacity in order to avoid his *personal* liability. A merchant's clerk employed in his store has no power to order his goods to be delivered to his creditor whose debt is not due. The clerk's power was to keep books and sell goods by retail. The agent who buys goods is not liable when he discloses his principal's name at the time. Principal is bound when the agent acts within the scope of his authority. If I give an agent a receipt for money by mistake, the principal is not liable, unless I give him notice of it, before he settles with his agent.

Olney *v.* Weekes, 18 Johns. R. 122. —363, Beals *v.* Allen. 15 Johns. R. 1. P. 44. P. 276.

The rights of the agent: where he acts fairly and without fault in his principal's service, he is subject to no expense by suit or otherwise, the law implies his promise to indemnify and to reimburse his expenses. The agents were trustees of a corporation.

Powell *v.* Trustees of Newburgh, 19 Johns. R. 284.

The deft., a captain in the United States' navy, in the war of 1812, employed the plt's. vessel in transporting military stores, and directed her to be sunk to prevent her capture by the enemy. Held, the deft. was not liable to the plt. Public officer is liable on his *express* promise. If in his *public* capacity he employs A to work on account of the government, he is not personally liable for the wages.

Bronson *v.* Woolsey, 17 Johns. R. 46. 12 do. 385.—Walker *v.* Swartwout, 12 do. 444.

§ 9. *Con.* If a promissory note be made to the agent or treasurer of a private association, by his name, with the addition of his agency or office, he may sue in his own name, on the note, the addition of his character being but *descriptio personæ.*

2 Greenl. 305—308, Clap *v.* Day.

§ 14. A gets possession of B's funds, though lawfully, and with them buys up B's notes when he is insolvent, at discount, yet A is entitled to no more than he actually paid for them, and B may give evidence to show at what rates they were purchased. For when an agent buys up the paper of his principal with *his*

1 Const. R. 244. 1 Cons. R. 251.

I. Ch. 9. *Art.* 18. *Con.*

funds, he shall not profit by it: where from a course of business, the jury will presume an agency. Cro. El. 878.

Where A acts as attorney to B, the contract must run thus; *B by A his* attorney, doth bargain, &c. &c. Same principle, 16 Mass. R. 42—47, Elwell *v.* Shaw. In this case the attorney recited his power in the deed he gave, and then added, Know all men, &c. that I, the said Joshua [attorney], by virtue of the power, &c., in consideration of $200 paid me by, &c., do hereby bargain, grant, &c., and I do covenant, &c.; I am duly empowered, &c. In witness, &c., I have set the name and seal of the said Jonathan [the principal]; signed Joshua Elwell and a seal. Executed badly; should be Jonathan Elwell, by Joshua Elwell, his attorney, doth bargain, &c.; same principle, 1 Greenl. 231, 238, Stinchfield *v.* Little; 1 Greenl. 339—343, Elwell *v.* Shaw. See ch. 15, a. 4, s. 15.

1 Har. and M'H. 178.

1 Greenl. 343, 347.

An attorney authorized by *parol*, executes a bond in his principal's name, and *afterwards* he is duly constituted by letter of attorney, dated before the bond; this is a subsequent ratification, and makes the bond valid.

2 Greenl. 358—361.

§ 18. Covenant on a deed. Held, one made by an attorney or agent, not authorized under seal to bind his principal, is not made valid by a parol ratification. 2. In such case, if the agent made the deed in his principal's name, he not being held, it does not follow the agent is bound by the deed unless it contains apt words for that purpose. See Hosier *v.* Searle, ch. 177, a. 8, s. 4; same subject, 3 Greenl. 380—388, Thorndike *v.* Barrett; 5 Barn. & Cres. 355.

Stetson *v.* Patten & al.

§ 19. An *agent* of a corporation is liable on a written promise not sealed, if he make it without authority; 2. And an agent may sue in his own name, on a contract with him, if interested in it, or is answerable over in consequence of it; 3. Is liable in all cases on his contract, unless the principal is disclosed, and he is then liable if the credit appear to have been given to him personally, or if he exceeded his authority. Two selectmen of the town, for the value of certain relief furnished by the town of Chester to paupers settled in Rumney. The action was founded on a letter written by the defts. to the plts., selectmen of Chester, as to a matter between the two towns; no vote of Rumney in the case; was an action at common law against the defts. Their letter show it was an affair of their town. The consideration seems to be the plt's. delay at the deft's. request. Judgment for the plts.; numerous cases cited. Further, the deft's. letter purported to be their *own* promise to the plts. themselves.

2 N. H. R. 352, 356, Underhill & al. *v.* Gibson & al.

Perkins appt. *v.* The Washington Ins. Co. of N. Y. City, 4 Cowen, 445—466.

§ 20. One may become the agent of a corporation in the same manner as he may of an individual, without any deed or writing. Appeal from chancery. The company appointed Henry P. Russell, of Savannah, a surveyor, and empowered

I. Ch. 9. *Art.* 20. *Con.*

him to make contracts of insurance (against fire) to take effect from the time the premium should be paid, and *should be received at New York, provided the office should recognise the rate of premium, and be otherwise satisfied with the risk.* R. advertised at Savannah the terms on which the company would insure, and subscribed as *its agent* at S., stating it would insure him, &c. Perkins paid the usual premium of insurance on certain goods, Jan. 5, 1820, to R., who gave P. a receipt for the money, describing himself as agent of the company, and specifying the consideration and objects of the receipt; but before the premium was received at New York the goods were burnt. P. afterwards tendered the premium to the company, and demanded to be indemnified or to have the insurance executed. Held, they were bound. Decree for him unanimous on reversing the chancellor's decree, premium being as usual. Kent was the chancellor; cited 19 Johns. 60, 15, do. 44; 7 Cran. 297; 15 East. 400.

Art. 20. *Con.*

§ 1 *Con.* Defts. promise to satisfy a lien on a vessel belonging to a third person, ready for sea, in consideration the plt. would allow her to sail, is not within the statute of frauds; but an agreement in writing to pay the debt of a third person without any consideration being expressed, is void by it. 1 Nott and M'Cord, 124—125.

The deft. having received goods to pay A's debt, promised B, about to attach A's property in the deft's. hands on A's note to B, that if B would wait till the fall, he, the deft., would pay the note. Held, a good promise not within the statute. See other cases, 1 Nott and M'Cord, 563; 2 do. 370, &c.; 1 M'Cord, 100, 395, 425, 575. 1 M'Cord, 486.

But Boyce *v.* Owens, a garnishee promised the plt. in an atttachment, that if he would discontinue it and wait for some months, he, the garnishee, would pay the deft. in the attachment. Held, this promise was void, it not being in writing. 2 M'Cord, 208.

§ 5 *Con.* A deposited in B's hands money and goods to a certain amount, on an agreement B should pay a certain note endorsed by C for his accommodation, and indemnify C against the note. Held, B's agreement was an *original* undertaking. Olmstead *v.* Greenly, 18 Johns. R. 12; other cases, 17 Johns. R. 113, 114; 15 do. 425; 18 do. 58, 515; 20 do. 338.

I do promise to pay the amount aforesaid, if C. S. should not pay it in six months. Adjudged a valid promise. 2 South. 570.

§ 35. Held, D, a member of a *manufacturing* corporation, so in certain events liable for its debts, in consideration B, the holder of a promissory note of the corporation, would deposit it in his hands till D should take up another note B made to C, and with the proceeds of it pay the note first mentioned; promised B to save him harmless from his said note to C. Held, this promise of D need not be in writing by the statute 17 Mass. R. 229—239, Colt *v.* Root.

I. Ch. 9. *Art.* 20. *Con.*

of frauds as the promise to pay another debt; for D's liability on the corporation's note to B, such as that liability was, created a sufficient consideration to make D's said promise his own, and not his promise to pay the debt of the corporation in the sense of paying another's debt. In fact it was to raise money in a manner specified and to pay C a debt B the plt. owed him.

Farley v. Cleveland, 4 Cowen, 432, 439. Error.

§ 36. One Moon, Nov. 22, 1815, gave the plt., Farley, a note for $100 and interest payable the next June. Jan. 1, 1817, Cleveland, the deft., in consideration of fifteen tons of hay (value $250) sold and delivered by Moon to him, at his instance, promised to pay Moon's note to Farley. Held, this promise was not within the statute of frauds of New York. 1 R. L. 78. s. 11. The principle stated in this case is the true one, to wit, where a promise to pay the debt of a third person arises out of some new consideration or benefit to the promisor, or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within said statute, though the original debt still subsists and remains unaffected by the new agreement. Savage, C. J. examined numerous English and American cases. The New York act is a transcript of the statute 29 Ch. 2. See ch. 1. a. 53. s. 4. and cases there, and cases ch. 11. a. 14. Also this 20th article.

Myers v. Morse, 15 Johns. 425.— 18 Id. 12.

Art. 22. *Con.*

§ 2. *Con. Indebitatus assumpsit,* in the Circuit Court in Ohio, for work and labour, care and diligence, by the plt. done, &c., as agent and attorney, in exploring, showing, surveying, and selling the lands of the deft's. testator; also in the searching of records, investigating titles and paying taxes, &c. Other money counts; and the plt. filed also 'a bill of particulars.' Held: 1. Where there is a special agreement, open and subsisting, at the time the cause of action arises, a general *indebitatus assumpsit* cannot be maintained. 2. But if the agreement has been wholly performed, or if its further execution has been prevented by the act of the deft., or by the consent of both parties; or, if the contract has been wholly performed, as to any one distinct subject included in it; the plt. may recover upon a general *indebitatus assumpsit.* 3. A settled account is only *primâ facie* evidence of its correctness, at law or in equity; it may be impeached by proof of fraud, or omission, or mistake, and if it be confined to particular items of account, concludes nothing as to other items not stated in it. The principles of this case need not be questioned.

11 Wheat. 237-258, Perkins v. Hart, ex'r.

19 Johns. R. 332, Robertson v. Lynch.

If the plt. count on a *special* agreement, and add a general count for goods sold and delivered, to this he cannot resort if the goods were in fact sold under the *special* agreement, and on which on a proper count the plt. might recover; and where the special agreement subsists in full force the plt. cannot recover

on the money counts, but the remedy is on the contract. 10 Johns. R. 205, Wood *v.* Edwards; 12 Johns. 27; 14 do. 326, this is the principle. Also same principle, Champlin *v.* Butler, 18 Johns. R. 169; so 13 do. 15. Jewell and others *v.* Schroeppel, 4 Cowen, 564—567, confirms the principles of this article, the acts of the parties raised a *new* case not within the sealed contract.

§ 7. *Con.* In the following instance the parties made a new case, &c. The plt. declared the deft. was indebted to him in account, and in consideration thereof and that the plt. would accept the labour of the deft. as a plumber and glazier, at reasonable prices to the extent of the debt, the deft. promised to do the work. Counts for money had and received, &c. It was proved the plt. by deeds had assigned certain premises to the deft. for a sum therein named. The deeds stated that sum to have *been well and truly paid*, and released the deft. therefrom. Parol evidence was given to show, that in fact part of the purchase money had not been paid, but that it was agreed by parol between the parties when the deed was executed, that part of the purchase money should be retained by the deft., and that he should do the work for the plt. to that amount. Held, that if this evidence was admissible, still it did not support the declaration: 2. That assuming the legal effect of the agreement to be, that the entire consideration money had been paid, and that part was returned in consideration of the deft's. promising to do the work, the parol evidence would not contradict the deeds, and would be admissible; but that inasmuch as the original debt was extinguished by the release in the deeds, and no new debt was created but merely an obligation to do work arising out of *a special new contract*, that ought to have been declared upon. Plt. nonsuited, for he was estopped by his deeds, for in them he had said the money was truly paid to him as purchase money. The *new special contract* was in *writing* but not sealed, though the court spoke of it as a *parol* contract. Two judges thought the proof of it consistent with the deeds, one not. Here was an *express* contract by *deeds*, and, in fact, as a part of the transaction, at the same time the parties made a *new special contract* in writing not sealed, as to the work the deft. promised to do. This is a common case, as before stated, for the parties who made an *express* contract, and in their acts as to it, to slide into another contract quite different, expressed or implied, and in proving this, the principle an *express* contract excludes an *implied* one, is not affected. 1 Barn. & Cres. 704—710, Baker *v.* Dewey. A new contract by *parol* was substituted to a *deed* and valid. 14 Johns. R. 330; 19 do. 205.

§ 13. *Con.* Where the deft. in his action departs from the special contract and recovers on the general counts, the plt. afterwards

I. Ch. 9. Art. 22. Con.

may adopt the same course; here both give up the special contract: this they may do. The plt. may sue on the implied promise or the special contract, if it contain no more than the law implies. 1 Pick. R. 57, 58; p. 118, 121.

CHAPTER X.

ACTION OF ASSUMPSIT. AGISTMENT.

Art. 2. Con. 1 Cowen, 248–249, Eastman v. Tuttle.

§ 8. *Con. Certiorari* to a justices court. Tuttle brought *assumpsit* against Eastman for depasturing and keeping on hay the deft's. cattle on land in the possession of Tuttle, the plt., at the deft's. request; the pasturing, keeping, and request were proved as laid; the deft., Eastman, offered to prove that the title of the land on which the plt. lived and performed the services, was at the time in the deft. This was overruled, and verdict. Judgment for the plt. Judgment affirmed.

CHAPTER XI.

ASSUMPSIT. AGREEMENT WRITTEN, HOW REQUIRED OR NOT.

Art. 2. Con. Clarkson v. Carter, 3 Cowen, 84–86.

§ 1. *Con. Assumpsit* for the deft's. refusal to receive and pay for three hundred barrels of flour sold to him by the plt. Held, on a cash sale of goods, the vendee is not entitled to have possession of them till he pays for them. Relied on the said case of Langfort *v.* Tiler's admr., and Sands *v.* Taylor, 5 Johns. R. 410–11. Same *concurrent* promises, 6 Cowen, 110–118, Chapman & al. *v.* Lathrop. But if to pay on delivery of the goods, and so the delivery and payment are *concurrent* acts, yet if the vendor deliver them without payment, the property passes and the condition is waived. *Aliter*, if obtained by fraud. Many cases cited and the reporter's notes added.

And 6 Cowen, 250—254, Rapelye and Smith, survivors of Lawrence, *v.* Mackie and others, *assumpsit* for goods sold and delivered and goods bargained and sold. August 21, 1822, the plts. sold sixtysix bales of cotton to the defts. marked G. G. & Co. As evidence of the sale, there was a bill of parcels delivered *pro forma;* charge thus 'sixtysix bales, say 19,800 lbs. $12 per hundred, $2378, one per cent. off.' Defts. paid $18,000 at the time. The plts'. cotton was in three stores at Brooklyn; one kept by A, there sixtynine bales—mark G. G. & Co.; one kept by B, and one by C: in C's thirty bales, same mark. Soon after the thirty bales were burnt. Defts. demanded sixtysix bales: refused. Weight not exactly ascertained. Held,

the loss by fire was the plts'.; that there had been no delivery of the cotton, and the thirty bales were not identified in the contract and it might have been satisfied by other thirty bales. If the goods are *to be* weighed, &c. there is no delivery or change of property, though part of the price be paid; and if part be delivered, the other part not yet ascertained will not pass. It is enough it appears in the case something more is to be done, between buyer and seller, previous to delivery. Defts. could not have insisted on having the thirty bales in C's keeping if not burnt. Court cited 15 John. 349; 6 East, 614; 11 East, 210; 12 East, 614; 13 East, 522; 2 M. & S. 397; 4 Campb. 237. I. CH. 11. *Art.* 2. *Con.*

§ 1. *Con.* Same principle in Maryland, 4 Har. & Mc H. 421, 422, Newman *v.* Morris, decided on the statute of frauds, 29 Ch. 2. See Rondeau *v.* Wyatt, sect. 12. ART. 4. *Con.*

3 Pick. R. 83—95, Cabot & al. *v.* Haskins & al. This clause applies to a promise by one to pay money to another as well as to mutual promises.

§ 3. *Con.* If an executor promise to pay the debt of the testator, and he has given bond to the judge, &c. to pay the testator's debts and legacies, this case is not within the statute of frauds, for the bond is an admission of assets. 4 Pick. 97-100.

§ 1. *Con.* The giving further time to perform a contract is no waiver of any of its stipulations. 15 Johns. R. 200. A deed is not affected by a parol agreement. Id. ART. 5. *Con.*

§ 7. *Con.* Part performance of a *parol* agreement relating to land does not take the case out of the act, so as to sustain an action *at law* for damages for the breach of the contract; but *assumpsit* lies for the expenses incurred in such part performance. Was a *parol* lease of a messuage for five years, rent $350 a year, tenant to make stores, &c.; did make them, &c. Equity in this case would have enforced the contract. ART. 9. *Con.* 1 Pick. R. 328, 332.

Parol agreements may be valid by referring to prior written ones, notwithstanding the statute of frauds. Pages 476–481

No writing is necessary where the contingency may happen within a year. Holt, 326; 1 P. Wms. 620. 1 W. Bl. 353.

A memorandum in writing of a contract for the sale of lands is not a sufficient memorandum within the statute of frauds, unless it some way shews who are the two parties to the contract. 1 N. H. Rep. 157—161. ART. 13. *Con.*

CHAPTER XII.

ACTION OF ASSUMPSIT. APPRENTICES.

§ 8. The master of an apprentice is bound to pay for medical attendance on the apprentice, from the very nature of the ART. 1. *Con.*

I. Ch. 12. *Art.* 1. *Con.*

relation between master and apprentice, and the father of the apprentice is only bound, when the services have been rendered at his request; otherwise as to *hired* servants, the employer is not bound to pay for medical attendance. See ch. 47. a. 3. s. 10; 1 Strange, 99; 1 Ves. 83. 4 Rand. 423—427.

CHAPTER XIII.

ACTION OF ASSUMPSIT. ARBITRATIONS AND AWARDS.

Art. 1. *Con.*

§ 3. An award cannot be set aside in law or equity except, 1. For errors apparent on the face of it. 2. Misconduct in the arbitrators; or some palpable mistake. 3. Or fraud in one of the parties. 4. Nor in equity for objections available at law, omitted by the party without any excuse. 5. Equity cannot revise a decision of a law court. See art. 15. s. 21. and ch. 34. a. 2. s. 8, principle seems different. Equity has jurisdiction to decree specific execution of an award, where the remedy at law is inadequate. 2. Where parties submit a question of law *alone* to arbitration, the award is binding, though contrary to law. 3. Awards are to be construed liberally. 4. Tenants in common of personal estate cannot have partition at common law, hence a court of equity is the proper tribunal to decree a partition of it.

3 Rand. 22-36, Head v. Muer, &c.

4 Rand. 95-103.

2 Jacob & W. 259.

§ 4. Held, on a bill to impeach an award, evidence of the merits only is to be received so far as it throws light on the conduct of the arbitrators. It is irregular for two of them to meet without notice to the third, though this is not sufficient to set the award aside, if the substance be settled in his presence. *Semble.*

P. 261.

5 Serg. & R. 51, Large v. Passmore.

§ 5. Judgment on bond by warranty of attorney. The parties submitted all matters in dispute to A, B, and C, their award to be final. Held, this reference was on the act of 1705, and not at common law, though not made directly under a rule of court. See 6 Binn. 422.

Art. 2. *Con.*

§ 3. Where there is a submission, the award to be made in a time named; before this time is expired, the parties, by another deed, may extend it. 2 Barn. & Cres. 179—189; see ch. 141. a. 3. s. 14; ch. 141. a. 3. s. 13; 1 Taunt. 656; ch. 111. a. 2. s. 2; 2 Barn. & Cres. 345. The death of one party to a submission determines the arbitrator's power. P. 801. If a party receive the costs of reference by the rule thereof awarded, he cannot move to set the award aside.

3 Barn. & Cres. 144, 407.

§ 5. Time enlarged by the arbitrator being authorised by the parties. Cause referred to A, and B, they to choose a third referee. A named one and B another, and they drew lots to decide which, &c. Held this mode was bad.

4 Barn. & Cres. 103.

§ 6. If parties submit by writings, not sealed, and insert a penalty, it is incurred by one who revokes.

I. CH. 13. *Art.* 2. *Con.*

§ 7. If arbitrators refuse to hear proper evidence it is misconduct and vitiates their award. So partiality or corruption in any one of the arbitrators, or the concealment of material facts by either party, if such facts would produce a different award, is cause sufficient for setting aside the award, and under the plea of no award, the deft. may show that the arbitrators awarded on a matter not submitted to them. 17 Johns. R. 405.—16 do. 227.

§ 8. The revocation of arbitrator's authority is a contempt, the submission, being by rule of court. 1 Jacob & Walker's R. 511.

ART. 4. *Con.*

§ 9. *Con.* And 2 N. H. Rep. 26. But if the parties make a private agreement to submit all demands to arbitration, and one is so omitted, an action lies thereon, and for the breach of the agreement; and the award on the other demands is binding, if the spirit and mutuality be not thereby violated: and the surety in such an agreement need not be notified of the setting of the referees. 97–429. All the referees must meet and hear, but a major part may sign. 484. 17 Mass. 458.

ART. 5. *Con.* 1 Rand. 449–456.

§ 4. *Con.* Where parties referred certain matters in dispute to arbitrators to award by a certain day, and if not agreed to choose an umpire, they finding they could not agree chose an umpire, who made his umpirage *before the day appointed for the arbitrators to make their award.* Held, this umpirage was good. 2. An award that requires the surety to pay, as well as the principal, is mere *surplusage* as to the surety; award good. 3. Everything is to be presumed in favor of an award: was an action on the arbitration bond against the surety, the principal being dead; pending the action, the surety died, and the suit was revived against his administrator. Plea, *nil debet*, and a special verdict. Judgment in the superior court for the administrator, reversed in the supreme court of appeals. The court said they could find no direct authority for the umpire's so early making his umpirage, but decided on general principles. But see ch. 141. a. 3. s. 18.

4 Rand. 275–281, Rison v. Berry.

A and B submit all matters in difference between them in a particular pending suit to C and D and *to such umpire as they shall choose*, and their award to be made the judgment of the court, and the two arbitrators and umpire act *together* and make a *joint award.* It is valid; and though the award does not state the third person signing the award had been chosen *umpire* by the arbitrators, that fact may be proved by other evidence. 2. If the third person signing were a mere stranger the award would be good. It was proved by parol evidence the third person was chosen umpire. If a stranger join, this does not vitiate the award. As to the joining, the submission was to A and B and their umpire, and *their* award to be the judgment of the court. Authority, Bulstr. R. 184; see Soulsby *v.* Hodgson, ch. 141. a. 3. s. 17. Vol. 5.

Beck *v.* Sargeant, 4 Taunt. 282.

I. Ch. 13. *Art.* 6. *Con.*

16 Mass. R. 396–7.

§ 4. The submission was by rule of court, and the referees awarded that the deft. recover the costs of action. Held, a good and final award, and is sufficient to warrant a judgment, the plt. takes nothing by his writ. Was in a pauper case, and the question referred was, if the income was £3. The court said the award by implication showed the referees must have decided the question. 2. If an attorney has power to prosecute or defend the action he can refer.

3 Greenl. 421–424.

§ 5. *What is an award?* The arbitrators write on the back of the bond stating they had 'met according to appointment on the within business, and agreed,' &c. Held, to be an award 'of and concerning the premises.' 2. Where a submission is of divers subjects distinctly enumerated, if it appears from the whole award, that all the matters submitted have been adjudicated upon, by the arbitrators, it is sufficient, though each particular is not specified in the award. The arbitrators also agreed A pay B (the parties) $— for his betterments on the within lot, in February next; also $6 for our trouble.

4 Pick. 179–198, Brown v. Bellows.

§ 6. Many points decided as to partnership rights in certain water privileges in Concord, with the buildings thereon, machinery, fixtures. Several in an award, as to deeds, tenders, &c. decided. One point, after the price had been fixed by the referees chosen pursuant to the indenture, it was too late for the deft. to object that by the statute of frauds the indenture was invalid, because the referees and the price were not ascertained by the indenture itself: another, that the tender by the plt. of a deed, purporting to convey the estate by metes and bounds, but not containing the words in the agreement, 'all his rights, title, interest, and enjoyments,' was sufficient: another, that the plt. might rely on such tender without producing the evidence of his title; the burden being on the deft. to show such a defect in the title as would justify him in refusing to accept the deed, &c. Fourteen pleas pleaded.

§ 7. *Award must decide finally the whole matter submitted,* and be confined to it: must be certain and conclusive of all the matter referred. 2. The arbitrators decided the plts. have credit a certain sum on account of lands sold to the deft. provided they grant to him a clear good title to the land; but they set no time when the title should be made. Held, the award was void, as not being final and conclusive. 3. A court of equity either enforces an award as it is made, or sets it aside,

11 Wheat. 446–467, Carnochan & al. v. Christie & al.

if in any respect defective; does not confirm as far as it extends, nor supply omissions. 4. Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established without a cross bill filed by the deft.

Art. 9. *Con.*

Greenl. 64, 68.

§ 1 *Con.* Report on this statute by referee recommitted; one neglected to sit again. Held, the other two could make an award similar to the former one, with additional costs.

After an arbitrator has made and published his award, he can- I. Ch. 1;
not reexamine even to correct an error. Peterson, plt. in error, *Art.* 9.
v Loring, 3 Greenl. 85. *Con.*

§ 5 *Con.* Held, the annexing the writ is a sufficient demand.
Held, if the referees under this act agree in their report before 1 Pick. R. 6
the court sits, but date it the 2d day thereof, the date cannot P. 269.
be altered, nor the report received.

Exceptions lie to a judgment of the Common Pleas, on a 2 Pick. R. 5
report of referees appointed under a rule of that court, though
it state that the judgment be final, and so the agreement of the
parties. See stat. 1820, c. 79, s. 5 and 6.

§ 9 *Con.* The statement of a demand on which a rule of 1 N. H. Rep
reference is made before a justice on statute of June 21, 1797, 190, 191.
must show on what account or for what cause the demand
is made.

§ 11 *Con.* A parol promise to perform an award, made be- Art. 10.
fore or after the award, binds the parties. 2. A note for the *Con.*
true sum is valid, though signed by consent, without knowing 2 N. H. Rep
the contents of it; but in an action on such a note before nego- 233—236,
tiated, or on such a parol promise, any defence may be made Page *v.*
that could prevail in an action on the award itself. If A sub- Pendergrass.
mit for B, his power must appear in the proceedings, or they P. 484.
may be reversed in error. An award is wholly void if it in- P. 429.
clude a note not owned by either party to the award at the time
of the submission; may include costs of reference. Is void on P. 216, 217.
a submission before a judge of probate, except it concern claims
rejected by commissioners; as the statute of Feb. 11, 1791,
only authorizes the submission of such claims in the cases of
insolvent estates.

§ 10. If the parts be connected, and one is void, the whole Art. 11.
is so; as where referees awarded A, one party, to deliver the *Con.*
said farm to B, the other party, and B to pay, &c. Void as to
the farm for uncertainty, no farm being before mentioned in the
papers, and there being no description of any farm; and this
part being connected with the money, &c., held, the whole
award was void. 2. Bond of submission dated August, 21,
1813, and award August 23, 1813, and referred to the bond as
dated 21st of *August last past*, the court, in support of the award
referred *last past*, not to *August*, but to the day, *the 21st*. As
to the words *last past*, were cited Allen *v.* Watson, 16 Johns. R.
205; Fisher *v.* Pimbly, 11 East. 187; Macomb *v.* Webber,
16 Johns. R. 237; 1 Salk. 72; 11 Johns. 103; 2 Mod. 169;
1 Ld. Raym. 715; 12 Mod. 534; Dyer, 376; Cro Jam. 646;
As to the void part, &c. Bedam *v.* Clerkson, 1 Ld. Raym. 123;
Cockson *v.* Ogle, Lutw. 550; Thinne *v.* Rigby, Cro. Jam. 314;
Kyd on Aw. 246, 259, 260. Void in part, 1 Greenl. 300, 304.

I. Ch. 13. *Art.* 12. *Con.*

§ 6. In this case, all matters of difference were referred to an arbitrator, but no mention of costs. Held he had power over the costs of the cause, but not of the reference; the American practice is generally otherwise. 1 Barn and Cres. 277.

Art. 15. *Con.*

17 Johns. R. 405.—11 Johns. Ch. R. 405. 2 Cowen. 638—652.

§ 22. An award may bar dower, by way of estoppel, though in part void, and though it passes not the title to real estate. See this case at large, Estoppel, ch. 160, a. 2. s. 10. Thereto may be added further points therein decided. The authority to award costs is necessarily incident to the power of arbitrators. 2. The rule is, that when one part of an award is irreconcilable with another, the first part shall prevail, and the last be rejected. This must depend on parts connected or not.

5 Cowen. 197—200.

§ 23. On a general submission, so that the award be made on all matters of controversy between the parties, of which the arbitrators have notice, and they do not award on all whereof they have notice, their award is void. See a. 11. s. 9. same law, and a. 13. s. 11.

5 Cowen. R. 425.

§ 24. A court of law will not set an award aside, except the arbitrators have acted *dishonestly* or *corruptly*. The court does not examine the merits, on an application to set it aside. 2. Burr. 701; 1 Stra. 301; 1 Saund. 327. d.

Gould and others, v. Ogden. 6 Cowen. 52, 53.

25. *Assumpsit* for goods sold, &c., and common accounts. Plea non assumpsit, and other pleas and reference. Held, if a question of law arise before referees, brought to this court and decided, it will order a special entry on the record, so as to present the same question in the court of errors.

CHAPTER XIV.

ACTION OF ASSUMPSIT. ASSIGNMENTS.

Art. 1. *Con.*

§ 7. *Assignments in Equity.* It is a well settled rule, that the assignee of a *chose in action*, takes it subject to all the equity of the assignor at the time, but not to any latent equity residing in a third person, against the assignor. So the assignee of a contract, for the sale and purchase of lands without notice, is subject to all the equity that existed between the parties, and can require a specific performance only on such terms as the assignor was entitled to. On appeal. 2 Johns, cas. 438.

2 Johns, Ch. R. 441—2 do. 479 2 Johns. R. 545.

Livingston v. Dean. 2 Johns. Ch. R. 479—512.

§ 8. To subject the assignee to the equity of a third person, he must have notice of it, express or constructive, at the time of the assignment.

Kane v. Bloodgood, 7 Johns, Ch. R. 90.

§ 9. An assignment of shares or stock in a company incorporated, passes all the growing profits thereon; and on action, at law, to recover such profits after ascertained and declared, lies at the suit of the assignee. Assignment of a trust, how in fee. See ch. 114, a. 17, s. 20.

I. Ch. 14. *Art.* 1. *Con.*

§ 10. An assignee of a chose in action, takes it subject to all equities existing against it at the time of the assignment, though he have no notice of such equity. 2. B recovers judgment against C, and A against B; and A assigns his judgment to C. This C may set-off against B's judgment, so recovered against C. (See set-off, ch. 168.) And when C's right to set-off is vested, it remains, though B afterwards assigns his judgment.

Chamberlin v. Day, 8 Cowen, 358.

§ 11. The assignment of a bond or debt secured by mortgage, carries the mortgage with it, as appertaining to the debt, the principal thing; and though the mortgage be not delivered over, the mortgagor having notice of the assignment cannot pay the mortgagee, and if he do so, and take a discharge, he must still pay the assignee.

5 Cowen. 202—207, Jackson v. Blodget.

§ 12. Appeal from chancery to the court of errors, held by a majority. 1. The assignment made by Cairns to his trustees is void, by reason of the trust or provision contained therein for the benefit of *himself;* the decree of chancery, so far was affirmed. 2. The judgment confessed by him to take effect if the assignment is void, and the decree of chancery affirming said judgment was reversed. The general object of the assignment of Cairns' property, was the payment of his creditors; and in the judgment, the reservation to Cairns himself was omitted, but deemed void, because, a part of the tainted assignment not abandoned so as to revest the property in the assignor before he confessed the judgment. 3. A contract or judgment illegal and void in part, as being against a positive statute, is illegal and void *in toto.*

Mackie v. Cairns, 5 Cowen, 548-586.

Art. 3. *Con.*

§ 2 *Con.* Feb. 10, 1820, Brooks attached the estate and credits of his debtor, Fitzburg, on the Maryland act of Nov. 1795, ch. 56. Levied on in the hands of Marbury, who was duly summoned as garnishee, Feb. 11, 1820. He pleaded he had no effects of Fitzburg, the absconding debtor, in his hands. Thereon issue was joined, &c. Verdict for Brooks, and judgment against the garnishee.

7 Wheat. 556-581. Marbury v. Brooks, in error.

Held a debtor has a right to prefer one creditor to another, in payment, and his private motive for giving the preference cannot affect the exercise of the rights, if the preferred creditor has done nothing to procure it. What will avoid or not the deed of assignment. 4 banks were the preferred creditors.

3 Pick. 495—506. Peters & al. v. Ballestur & al.

Trover for several hogsheads of molasses. Plea the general issue. The parties agreed before the vessel sailed, that the bill of lading of her cargo should be assigned as security for a debt. But she sailed before it was made; but by antedating the assignment, it purported to have been made before she sailed. No possession of the property was taken. This assignment held valid as to the parties and strangers not acquiring a legal title to

I. Ch. 14. Art. 3. Con.

the property, without notice of the assignment. See many cases collected, 11 Wheat. 99—102.

4 Pich. 265–268. Borden & al. v. Sumner.

A, insolvent made a general assignment to B and C, in trust. They with the proceeds of his property, assigned to pay certain creditors in full, and apply the surplus to the payment *pro rata* of other creditors, who within a certain time should release their claims against the debtor. Held this assignment was void as against a dissenting creditor, so far as respected the surplus not wanted to satisfy the demands of those who joined in the agreement. 2. One summoned as trustee, having disclosed such an assignment, was adjudged trustee, it not appearing the money due from him was wanted to pay the assenting creditors. There was an important question started in this case, whether the requiring creditors *to release all their debts*, however little they might receive, did not render the whole void. Alluded also to Widgery *v.* Haskell, 5 Mass. R. 144, cited ch. 39, a. 5, s. 14.

4 Pick. 518–524, Ward & al. v. Lewes & al.

Bill in equity. An assignment by an insolvent debtor in trust for his creditors, by an indenture of three parts, is signed and sealed, and purports to have been delivered by the debtor, the trustees, and some of the creditors. One part is found in the hands of the trustees, another, months after the date, in the hands of the creditors, and in adjusting their claims, was often referred to both by creditors and trustees. The debtor's property passed to the trustees, who, as such, appeared before the creditors, and made proposals to them in the name of all the trustees, and he often mentioned it as held by assignment, and sold by him for the creditor's benefit, and the debtor stated to a creditor, he had assigned his property, &c. Held, 1. Here was sufficient evidence of the delivery of the deeds: 2. Parol evidence not admitted to prove the delivery was on condition: 3. Such trustee would not be allowed to deny the trust: 4. When a trust is created for the benefit of third persons, they are presumed to accept, &c.

§ 6 *Con. Assignment and pledge of notes, not negotiable*, how protected. A and B jointly mortaged a piece of land to secure the payment of their debt. A deposited in B's hands such notes C owed A, to secure B as to paying both moieties of the debt, B to collect them, and pay the proceeds to the mortgagee, to which C assented. Held, A could not receive payment of said notes of C, nor release him from his liability to pay them to B. B brought the action against C, making A the plt., in form, as the notes were made to him and not negotiable.

11 Wheat. 78–102, Brooks v. Marbury.

Assignment for the benefit of creditors, though involving important principles, they are such as are already stated in this work, especially in this and in ch. 18 and 39. See *ante* Marbury *v.* Brooks. That a debtor may prefer one creditor to another is true; but the preference clearly must be fairly and

legally completed to exclude all attachments of the debtor's property. Was the preference so completed in this case? Does not a legal attachment, in such a case, prevent the after assent of creditors having any effect? I think this point has never been well considered. 1 Pick. R. 503.

§ 10 *Con.* Trover for a promissory note, made by one Kilburn, to the plt. or order, on condition. It was deposited with the deft. to be delivered to the plt., if no mortgage, &c. While so deposited, it was assigned to one Reed, for whose benefit the action was brought by deed, with power to sue, &c. Plt. demanded the note and refusal, &c. 2. Held, the assignee could maintain trover in the name of the assignor.

§ 11 *Con.* Same in Virginia, 4 Rand. 166—171; as if, under the Virginia act, the obligee assign the bond, the assignee acquires only an equitable interest; this he may assert in his own name, at law, or in the name of the obligee for his benefit, as at common law. 3 Greenl. 346–350.

Assignment of a fund. Where an order is drawn for the payment of the *whole* of a particular fund, it is an *equitable* assignment of that fund to the payee, and after notice to the drawee, it binds the fund in his hands. Was error *coram nobis*. The assignment was of a book debt, $19,34 cts. due from the deft. to the plt. Plt. drew out a bill of particular items, at the bottom, wrote the assignment, thus; 'Capt. Samuel Bacon. —Sir, for value received, please to pay Wm. R. and C. Stockbridge $19,34 cts., and the same shall discharge the above bill. N. Yarmouth, March 2d, 1824: Thaddeus Robbins.' Bacon declined paying, &c; thought the bill high, and the next day he was summonned as trustee of Robbins, at the suit of A, and adjudged trustee. Held, Bacon was liable on the order, though he had not excepted it, nor was it necessary he should. Judgment for the plt. for the use of the assignees. Robbins v. Baron.

Equitable assignment of a receipt by an officer to the plt. As where the officer attached goods for the plt., and took A's receipt for his safely keeping them, the plt. has no concern in it; but if the officer assign it to the plt. or to his attorney, for his use, then it becomes the plt's property, and he may make use of it, using the officers name. Clark *v.* Clough, 3 Greenl. 357, 362; and p. 362–369, Rogers *v.* Hains the *equitable assignee* of a chose in action, is estopped by verdict and judgment thereon, in the same manner as if he were a party to the record; for the suit being for the benefit of such *assignee*, and at his expense, he has a clear right to cross examine, &c. the witnesses, &c. See Calhoun *v.* Dunning, 4 Dal. 120.—19 Johns. R. 95–342, of a judgment, 20, id. 142.

§ 21. Otherwise, had the deft's matter of offset arisen *before* the assignment, in that case the *after* assignment could not have deprived him of his *prior* right of set-off; but one so situated

I. Ch. 14. *Art.* 3. *Con.*

may *waive* his set-off, by his promise to pay the assignee, or by fraudulently concealing his set-off from the assignee, or in conversing with the assignee leave him, when he takes the assignment, or at any time, to believe there was no set-off, or none will be set up. This last is the case, 3 Greenl. 453–671. Merrill *v.* Merrill. Holt, assignee of a note not negotiable.

12 Wheat. 605 –611.

When a bond is given to indemnify the obligee in it as endorser of notes drawn by the obligor, and the consideration fails, the assignee takes it subject to all equities existing between the obligor and obligee.

5 Pick. 28.

Where the insolvent assignor, may, on condition, reserve property to himself.

1 Hop. Ch. R. 373–407, Mackie & al. *v.* Cairns & al.

§ 25. *Fraudulent assignment.* See *Insolvency.* A merchant, failing, made sundry deeds of assignment to trustees of his property, in trust to pay his creditors, thereby put into different classes of priority. One of the deeds reserved an annual sum to the debtor, for a limited time, and all the assignments were subject to this trust. By another deed it was provided if any creditor should attach the debtor's property, such creditor should have no benefit of the trust; this was afterwards annulled. Afterwards, fearing the assignment would be invalid, the debtor confessed a judgment to the same trustees, on the same trust for creditors, but with no reservation for himself. It was intended to resort to this judgment, only in case the assignment should not be adjudged valid. 1. Assignments were all adjudged void. 2. The judgment is valid; the intention as to it did not infect it with the vices of the assignments. 3. The insolvent debtor may prefer some creditors, and may secure them by a judgment in favor of trustees. 4. Any reservation for himself, renders void the whole in law and equity. 5. The deed, as to attachment, was void. The judgment confessed to Robert Sedgwick and Daniel Lord, Jr., the trustees, for $96,103 2 cts. of debt, and $18 36 cts. damages and costs, by William Cairns, the debtor, became a *lien* on his land, Aug. 1, 1823. The judgment obtained against him for $3376 74 cts., by said Mackie, &c., became a *lien*, Aug 8, 1823. The money in question arising from the sales of Cairns' land, is less than the $96,103; and the judgment to Sedgwick and Lord, being valid and in trust for honorary and confidential creditors of Cairns prevails to absorb the fund. The circuit court held the assignments valid, from which Mackee & al. appealed. The reservation to Cairns was $2000 a year, not exceeding four years, to support him and his family. The trustees contended this was reasonable, and no fraud. It was this reservation which tainted all the assignments, in all their parts, as they could not be good in part and void in part, as Cairns and the trustees contended they were, relying on Eswick *v.* Cailland, cited ch. 32,

a. 1, s. 3, and other cases. Costs allowed Mackie & al. out of the fund in controversy; same to trustees who held it. 1. Ch. 15. *Art.* 1. *Con.*

Where an assignee takes a mortgage subject to all equities, and, among others, to a set-off. See set-off, ch. 168. 1 Hope. Ch. R. 579–584.

CHAPTER XV.

ATTORNIES.

§ 2 *Con.* The court held, that in suits requiring great professional labor, where much time must necessarily be consumed, and diligence and skill required, in the preparation and management of them, an attorney may rightfully and legally charge, by way of council fee, a sum in proportion to the value of the services, and which the jury, upon evidence before them, are competent to ascertain and decide. Art. 1. *Con.* 1 M'Cord, 149.

When a solicitor has been duly appointed by a party, and acted as such, he is not removeable without the court's order, and another substituted; his duties are like an attorney's in the courts of law. Other reasons stated at large; same rule in the courts of law in New York. 1 Hop. Ch. R. 369–371.

§ 12. *An attorney's promise to indemnify an officer for an illegal arrest*, is valid.

The plt. declared on the joint promise of the two defts. to indemnity him for taking the body of one Leland, and committing him to jail, on an execution against the Cheshire Crown Glass Company, of which Leland was supposed to be a member, and recovered. Plea, never promised. The attornies were partners. One in the first instance made the promise, which could not bind the other; but he afterwards assented to it. The partnership afforded a presumption the one who first made the promise meant to bind both, and the after consent confirmed it. 2 Pick. R. 285–292, Marsh v. Gold & al.

Two admissions made during attempts to compromise an action, of particular facts, independent of any offer, may be given in evidence. Attorney's lien, 3 Greenl. 34.

§ 13. *Attornies' power, how continued*, 1 Greenl. 257—261, till the judgment he obtains is satisfied. If levied on land it is not satisfied till the right to redeem is gone. Hence, payment may be to the attorney at any time within a year after the extent, and if so paid, the creditor is barred his writ of entry. Gray *v.* Wass. So he continues even to recover the original debt of the bail. This he may do and is bound to do according to the decision in the case of Dearborn *v.* Dearborn, 15 Mass. 316.

I. Ch. 15. *Art.* 1. *Con.*

§ 14. A written power to an attorney need not be acknowledged, unless used to convey real estate. He has power to permit a sheriff to renew an execution in the name of his client. If by a written agreement made in court after an action is entered, an attorney stipulates, on a continuance, to waive certain objections to the evidence in the case, the agreement may be deemed a part of the record, and at the next term estop the party to make those objections.

2 N. H. Rep. 310. P. 376. P. 520.

Art. 3. *Con.*

§ 2. How an attorney must execute his principal's deed, see ch. 9. a. 18. s. 14, Afridson *v.* Ladd, and cases cited.

The power of attorney to sell lands, does not require, as between the parties, any particular mode of attestation, but may be proved in the usual way in which any other fact is proved. 2 Rand. 93—108; 1 Caines' Cases, 3.

Art. 4. *Con.*

§ 15. *Con. Though his death be not known to the attorney: but if revoked, not till notice to him.* As where one Jackson, in a foreign country, owned lands in this, March 25, 1811, gave a power of attorney under seal to Harper (a plt.) to sell the lands. Jackson died August 13, 1313. January 8, 1814, Harper, not having heard of his death, sold the lands, by a proper deed, to Little (deft.), who paid for it $1500. This sum remained in Harper's hands. He married one of Jackson's heirs, and thinking the deed was void, he and his wife, &c. sued Little to recover the lands. Held, 1. The said deed was merely void: 2. That Little, the purchaser, could recover back the $1500, he paid, from Harper, the attorney: 3. As his deed was in *auter droit*, he was not estopped to say it was void: 4. The deed was not his own for want of apt words to bind him: The remedy against Harper was as above: 5. The attorney is not estopped by the deed, unless it be *his* deed and *he is bound by it*. Not so here, for the deed is a very correct one to bind the *principal* (were he living). See ch. 9. a. 18. s. 5, &c. Agent and Principal.

Power of attorney coupled with an interest or not. See 8 Wheat. 174—216, and Power, Index; ch. 135. a. 6. s. 4. 21, the subject examined.

1 Barn. & Cres. 160.

Whenever an attorney in court engages *personally* he is bound *personally* to perform.

§ 19. *Con.* But a deed duly executed, acknowledged, and recorded, is evidence of a power of attorney recited in the deed as a part of it. 3 Har. & Mc H. 594 to 625, Davidson's lessee *v.* Beatty.

2 Mason, 244—252, Hunt *v.* Rousmaneer's adm'r.

On a bill in equity in Rhode Island, held, 1. If A give a power *coupled* with an interest, it does not expire with A's death: 2. Nor does his naked power necessarily; for it may be one to be used after A's death; as a power to his executor to sell his land after his decease to pay debts, &c. 3. A's

naked power, that expires with his death, is one that must be executed in his name and *as his act*, not as B's, as a power of attorney to execute a deed in A's name and as his act: 4. A power given to B, as collateral security for a debt, cannot be revoked by A, but it dies with B. It is not a power coupled with an interest in a legal sense. Willes' R. 565, Wynne *v.* Thomas.; see ch. 135. a. 6, several cases; see Hunt, &c. 8 Wheat. 174—216. I. Ch. 15. *Art.* 4. *Con.*

Bill in equity against Reed, an attorney and counsellor at law, for fraudulent misconduct in respect to the plt. his client. Held, an attorney is bound to disclose to his client, if he has any adverse retainer, which may affect his own judgment or his client's interest; but the concealment of the fact is not a necessary presumption of fraud. 3 Mason, 405—428, Williams *v.* Reed.

In a regular complaint against an attorney the charges must be on oath. This he may waive, and without it the court may proceed at his request. The testimony to support the charges must be on oath. 9 Wheat. 529—531.

§ 33. Money collected by an attorney for his client must be demanded before the client can move for an attachment for the non payment of it. See ch. 9. a. 18, many cases of principal and agent often involving the powers and duties of attornies. So factors, ch. 30. Vol. 1. 6 Cowen, 596.

CHAPTER XVI.

ACTION OF ASSUMPSIT. SALES AT AUCTION.

§ 4. *Con.* Same principle as to an under or by-bidder. 4 Har. & Mc H. 281—283. But contra, 2 Cons. Rep. 821, holding he is a fraud on the fair bidder, if not made known; and that the highest fair bidder is not held to complete the contract; but he is held if real fair bidders alone run up the price, though an under bidder be employed, known only to the auctioneer, for in such case the puffer's bid has no injurious effect. Art. 1. *Con.*

§ 15. Held, the sales of goods at auction are within the 29th of Car. 2. ch. 3. s. 17. If the conditions of sales be annexed to the catalogue then the auctioneer's putting down the bidder's name opposite to the lot in the catalogue bid off by him, is sufficient to take the case out of the statute. 2 Barn. & Cress. 945.

§ 16. *Fraud in a sale at auction.* Mortgaged premises with power to sell were put up for sale, at auction, pursuant to notice. The assignee of the mortgagee acted as auctioneer. While the premises were up, the actioneer saw the deft. coming, who had purchased under the mortgagor, and the auctioneer immediately knocked down the premises to his brother, as the highest bidder, for half the mortgage debt. This precluded

I. Ch. 16. Art. 1. Con.

competition. Held, the deed given to the brother was fraudulent and void. If the vendor of goods fraudulently conceal material facts (at auction or private sale) as to them, to the injury of the vendee, an action is maintainable to recover damages; but the fraud must be clearly proved and cannot be presumed.

Jackson v. Craft, 18 Johns. R. 110.

Art. 2. Con.

§ 10. A sale of goods at auction is within the stat. of fraud, 1788, c. 16. s. 3. 2 Pick. R. 64. See the word Auction in the index. *Quære*, if the English doubts have not been confined to sales of real estate principally?

2 Barn. & Cres. 511-514, Phillips v. Bistolli.

§ 11. *A fact for the jury.* *Assumpsit* for goods sold at auction. Plea, *non assumpsit*. By the conditions, the buyer was to pay thirty per cent. on the price, on being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to the deft., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated he had been mistaken in the price and refused to keep it. No part of the price had been paid. Held, it was a question of fact for the jury whether there had been a delivery by the seller and the actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. The deft. was a foreigner, and but imperfectly understood the English language. A person interpreted for him and said to the plt. the deft. understood the price at which the earrings was knocked down to him was fortyeight guineas, (not eightyeight the plt. understood). If *Assyrian* garnets, they were worth only £50; if *rubies*, eightyeight guineas. Cited 1 East, 192 (is cited ch. 32. a. 10. s. 2.) 1 Moore, 326; 5 B. & A. 855.

CHAPTER XVII.

ACTION OF ASSUMPSIT. BAILMENTS.

Art. 1. Con.

§ 3. *Con.* But liable if he keeps them with less care than he keeps his own. 3 Mason, 132—136.

Where money in a bag has been deposited merely for safety, no action lies for it, until after a special demand; and if the depositer die, the common advertisement of his administrator of his appointment, and calling on all indebted to the estate to pay, is not a special demand.

Art. 3. Con.

§ 2. B for years keeps a mill in Virginia to turn the wheat of himself and neighbours into flour. He receives their wheat '*to be ground*' all into a *common heap*, and for each five bushels returns to them a barrel of flour, out of a *common stock* so arising,—A, sensible of this course, sends one hundred bushels of wheat to the mill, '*to be ground*,' and so to receive flour

In the course of the business, the mill, wheat, and flour are all burnt by accident, and no fault in B, the loss of the one hundred bushels of wheat is A's, it being his property not sold to B. The court of appeals said, 'by the terms of this *custom*, this wheat is to be *returned* to the farmers collectively taken. These circumstances completely negative the idea of a *sale* or *exchange* of the wheat, which would carry with it the transmutation of property.' 1 Rand. 3—11 Slaughter *v.* Green & al.; like case, Seymour *v.* Brown, 19 Johns. R. 44. I. CH. 17. *Art.* 3. *Con.*

The bailee's action against a trespasser is a bar to the bailor's action for the same cause. 2 N. H. Rep. 143.

§ 12. Neither pawnee or mortgagee of a chattel is liable to attachment or to the trustee process. See ch. 112. a. 7. s. 20. ART. 4. *Con.*

§ 13. *Pledge in equity returnable in like property.* Feb. 1818, the defts. stock and exchange brokers, lent monies to the plt. and he pledged four hundred and thirty shares in the U. States Bank, as collateral security for his note, payable Jan. 20, 1819, and then if not paid they might sell the stock and account to him for the surplus, holding him responsible for any deficiency. During all the time the defts. had shares of their own, standing in their names, and at their absolute disposal to an amount far exceeding said four hundred and thirty shares pledged by the plt., and not marked or identified as his property, but blended with their shares, and they were always ready and able to transfer the four hundred and thirty shares to him on his paying his note. Held, they were not bound to account to him for his stock at the highest price at which shares were sold by them at any time during the period; but that the like number of shares held by them when the note became due were to be considered as the shares so pledged by the plt., and which the defts. were at liberty to sell, as by their agreement to reimburse the amount of the note which remained unpaid. Nourse *v.* Prime & al. 4 Johns. Ch. R. 490.—7 do. 69.

§ 3. Where the profession of the bailee implies *skill*, then want of skill is imputable as *gross neglect*, Stanton *v.* Bell, 2 Hawkes, 145; but a *mandatory* who receives no reward is liable only for *fraud* or *gross neglect*. Id. Freighters for hire on navigable rivers are viewed as common carriers and subject to their liabilities. The words of a bill of lading 'the dangers of the river only excepted,' signify the natural accidents incident to that navigation, not such as might be avoided by the exercise of that discretion and foresight expected from persons in such employment. This case respects rivers in North Carolina. ART. 13. *Con.* 10 Murphy, 417.

§ 4. In an action against a carrier by water, the value of the goods at the port of reception is the proper measure of damages, unless a different rule be required by some fault on the part of the carrier. 4 Hayw. of Tennessee, 114, Edmunson *v.* Baxter.

I. Ch. 17. Art. 19. Con.

§ 2. *Remarks.* In the essay of Sir William Jones, on the law of *bailments*, republished in New York in 1828, with American notes, and from the third London edition, there is collected together various branches of the law under this one word '*bailment.*' This American edition is swelled to an octavo of 260 full pages, or more. The few pages in this chapter, in comparison, may seem a mere sketch; but carefully examining this octavo, I find but very little to be added in this abridgment, because, in this 17th chapter, is included only the first principles of bailment, and a few cases to illustrate them. The detail and cases, and some principles have been placed in many other chapters, as coming under various branches of business very properly, especially *agent and principal*, chapters 9, a. 18, and ch. 59 &c.; *Agistment* ch. 10; Bills of Lading, ch. 21; Carriers, ch. 23; Consignments, ch. 25; Factors, ch. 30; Freight, ch. 33; Innkeepers, ch. 37; Liens, ch. 44; Partnerships, ch. 52; Post-office, ch. 54. Ferries, ch. 67; Negligence, ch. 73; Trover, ch. 77; in these, and in other chapters, may be found all the material cases on the subject.

§ 3. Jones makes but five divisions in bailment. This is not material; on the principles of the bailee's responsibility, there may be but three divisions; his gross, *ordinary*, and *slight* negligence, if we consult the branches of business and trusts, wherein there is *bailment*, that is, wherein one man *is entrusted with the possession of another's property, without ever being the owner of it*, to return or to dispose of it to others.

§ 4. Jones says, 'bailment is a delivery of goods in trust on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed, shall have elapsed, or be performed.' He speaks only of *redelivery*, but he states, and correctly, numerous cases in which there is *no redelivery;* as where the *carrier* by land or water, the bailee, carries the goods from the vendor to the vendee, consignor to the consignee, &c. He then defines his five kinds of bailments, as *deposit*, *mandate*, *lending for use*, *pledging*, and *letting for hire.*

p. 117.

He defines the bailees' three kinds of neglect thus: '*ordinary neglect*, is the *omission* of that *care* which every man of *common prudence, and capable of governing a family*, takes of *his own* concerns.' 2. '*Gross neglect* is the *want* of that *care* which *every man of common sense, how inattentive soever*, takes of *his own* property.' 3. '*Slight neglect* is *omission* of that *diligence* which *every circumspect and thoughtful person* uses in securing his own goods and chattels.' It follows, he says, as *axioms* following from natural reason, good morals, and sound policy: 1. 'A bailee who derives *no benefit* from his undertaking, is responsible only for *gross* neglect,' as the depositary:

pp. 117, 118.

2. 'A bailee, who *alone* receives *benefit* from the bailment, is responsible for *slight* neglect,' as the borrower *gratis*: 3. 'When the bailment is *beneficial* to *both* parties, the bailee must answer for *ordinary* neglect.' These principals and axioms agree exactly with those before stated, taken from the books at large. I. Ch. 17. *Art.* 19. *Con.* p. 118.

§ 5. A few more axioms and maxims may be here brought together, found scattered in this volume, and in this abridgment. Every bailee is answerable for actual *fraud*, and no stipulation can excuse it.

Gross neglect is a violation of good faith.

A *naked contract* is one made without *consideration*, and thereon no action lies, unless the bailee *enter* on its execution.

Bailee is answerable for his *ordinary* neglect; as a pawnee; a *hirer* of a thing; a workman for hire; a carrier for hire; a *letter to hire* of his *care and attention*.

For *slight* neglect; *a borrower for use*; one engaging *truly* and officiously, to keep or carry another's goods, though without reward.

Bailee liable *in all events*, as if he keep the goods *after lawfully* demanded, whether *hirer*, *pawnee*, or *borrower*; or after the time stipulated; or departs from the agreement in the use; so is a pawnee or depositary, if he use the thing pawned or deposited, except as above.

Bailee where answerable, though robbed by irresistible force; the *common carrier* is, except by *public* enemies, as to whom he can have no remedy over, is a principle of public policy; innkeeper is a common carrier.

Jones's general remark. 'Every bailee is responsible for a loss by *accident* or *force*, however *inevitable* or *irresistible*, if it be *occasioned* by that *degree of negligence*, for which the nature of the contract makes him liable generally.' Though these principles have been in each edition of Jones's Essay, they deserve particular notice, because retained in so many editions, and after so much examination by himself and others.

§ 6. When, pages 85, &c., he speaks of *locatio*, or *hiring of a thing*, and thinks the English law demands of the *hirer* no '*more than ordinary* diligence,' he means the *common* hirer, and not the *common carrier*, made liable in all cases, except where excused by the act of God and of public enemies. See ch. 23, a. 1, s. 8. As to the few late decisions on this subject, they are not, except in two or three instances, brought into this chapter, but placed in the chapters before named, especially as to carriers, factors, liens, &c.

§ 7. We may here, in confirmation of Jones's opinion against that of Holt, cite a late, N. York case, Miller *v.* Salisbury; 13 Johns. R. 211; where decided, if a horse be hired to go on a journey, and during the due prosecution of the journey, without

I. Ch. 18. *Art.* 19. *Con.*

any ill treatment by the hirer, become lame, the hirer is not answerable for the damage. This is a loss that falls on property, of course on the owner of it.

§ 8. Though bailment is, generally, confined to *moveable* things, yet in some cases, it is extended to things *immoveable*; as when A owns a farm, and lesses it to B by parol, for years; B, of course, takes *possession* of the farm; now on the principles of the common law, B is bound *to use the farm in a husbandman like manner*, though he pays an agreed rent, and to preserve the buildings, fences, gardens, plants, trees, &c., &c., in the same manner that *every prudent person* preserves and uses them when *his own* property, and the relation of landlord and tenant is a sufficient consideration for the tenant's implied promise so to use, manage, and preserve all, thus put into his possession. See Harris *v.* Nantle, ch. 78, a. 10, s. 4; Powley *v.* Walker, ch. 1. a. 34, s. 1; Legh *v.* Hewett id.; and 4 East. 154–162, ch. 66, a. 1, s. 4; ch. 74, a. 6, s. 4; 1 Bos. and P., N. R. 290; 1 Marsh. 567: where a chattel is let for hire, the bailee must keep it in repair; Doug. 748.—1 Saund. 321.

Jones, Am. Ed. 1828. pp. 91, 91 a. &c.

§ 9. Generally when, *for a reward* agreed or given by law, A receives my goods to keep, to operate upon, or to carry, as a *private* carrier, he is bound to take *ordinary* care of them.

§ 10. The new code of France on this subject is less complex.

CHAPTER XVIII.

ACTION OF ASSUMPSIT. BANKRUPTCY.

Art. 1. *Con.* 2 Barn. & Cres. 293.

§ 6. Held, the property assigned by a bankrupt, *subsequently* to his bankruptcy, does not absolutely vest in the assignees, though they have a right to claim it; but if they do not make any claim, he has a right to it, against all other persons. The same principle may exist in many cases of insolvency.

§ 7. The bankrupt in France, does not appear to have such a right. The new bankrupt law, there, is more careful to secure his property to his creditors. There, the moment he fails, his person and estate are secured; his person, to answer for misdemeanors, and his estate, to be divided among his creditors; and the law does not appear to allow him any property of much value, while his creditors are not paid. It, too, appears to be a primary object of the French insolvent and bankrupt laws, to prevent dissipation, and to teach Frenchmen that the prosperity of trade depends not only on good faith, but also, on order and economy, intelligence and good conduct; and to prevent secret frauds in trade, it appears to be another essential object to bring the dealings of merchants, traders, and others, the subject of

those laws, as much as possible under the inspection of public authority. I. Ch. 9.

§ 16. *A bankruptcy in England includes not the bankrupt's property in the United States.* An important case. A, B, and C, residing in England, became bankrupts, and had a debt due to them from D, E, and F, of Maryland. A owed a debt to the plts., Wallace & al. Held, in the general court and in the court of appeals, on general principles, the plts. might well attach and hold in the hands of D, E, and F, garnishees or trustees, A's third of the debt they owed A, B, and C, and though the debt due to the plts. was contracted in England. The plts. first got a judgment against A in the general court for £1544. 2*s.* 7*d.* current money, then got a judgment for an attachment against A for said sum and costs, sued it out, and laid it in the hands of the defts. garnishees, who then, &c. owed A, B, and C £839. 14*s.* 8*d.* sterling, a third of which was A's part, as one of the partners of A, B, and C, and the defts. owed A only as such partner; and said A, B, and C were not indebted to any citizen of Maryland. One of the plts. was in England when A's debt was contracted, and there remained, acted for the plts. in contracting A's debt; nor was it known A, B, and C had property to pay their partnership debts. Judgment as above. *Art. 2. Con.* 2 Har. & Mc H. 468–469, Wallace, &c. v. Patterson, &c.—4 Har. & Mc H. 330 to 351, Ward v. Morris, &c. 406.—4 Rand. 282.

§ 37. *Con.* It has been observed the new commercial code of France is severe as to bankrupts and insolvents, as it excludes the insolvent from the exchange, made by law a place of business, subjects even the simple bankrupt to be prosecuted in the tribunals of correctional police and to imprisonment not exceeding two years, and the *fraudulent* bankrupt to be prosecuted as a *criminal, ex officio,* in the courts of criminal jurisdiction, and to the punishment of hard labour for a limited time, and accomplices the same, including the wife. Penal Code, art. 402; and art. 403. Exchange agents and brokers failing in business are punished in the same manner. But if convicted of *fraudulent* bankruptcy their punishment is hard labour for life. Art. 404. Penal Code. Arts. 586, &c. Commercial Code, it is declared what acts, &c. constitute a *simple* bankrupt: 1. If the expenses of his household he is required to enter monthly on his journal are adjudged to be excessive: 2. If it be proved he has wasted large sums in gaming, or in operations of mere hazard: 3. and 4. Other ways. What acts constitute a *fraudulent* bankrupt, as *Art. 3. Con.*

1. If one insolvent has stated fictitious expenses and losses, and does not account for the employment of all received by him.

2. If he has eloigned any sum of money, any credit, any goods, produce, or moveable effects: 3. If he has made fictitious sales, negotiations, or donations:

4. If he has fraudulently acknowledged debts to fictitious creditors, either by false writings, or making himself debtor, without consideration, by public acts or by engagements under private signature:

5. If having been charged with a special commission to receive money, commercial securities, produce, or merchandize, for another person, or constituted depositary for any of those things, he shall have violated the trust, and applied to his own use the funds or the proceeds of the property confided to him:

6. If he has purchased real estate, or personal, by using an assumed name: 7. If he has concealed his books; if he has kept no books, or if his books do not show the true state of his debts and credits. Com. Code, arts. 593, &c.

Art. 598. Accomplices may be further punished by being adjudged, 1. To restore to the creditors' general fund, the property, rights, claims, fraudulently acquired by him:

2. To pay into the said fund a sum in damages equal to the amount whereof he attempted to defraud it.

To evince the propriety of the said laws, the orators, who helped form them, in their expositions of the motives, said they were to remedy the disorders, which, for some years past, had so scandalously tarnished the commercial honor of France. They alleged two principal causes had been discovered to exist: one, 'the revolution, which, by its violent commotion, overthrew men, fortunes, and ranks, offered alike to hope and fear the most irregular and boundless chances of elevation and ruin, put in the place of money a paper currency of which the forced circulation and rapid fall left no fixed value to anything nor credit to any person, and which opened an extensive field to the calculations of avidity and the speculations of dishonesty. Failures, far from being a subject of shame, had become the means of fortune, the source of which scarcely any care was taken to disguise; and if those numerous bankruptcies were not always the work of fraud, they were at least the offspring of ignorance, because everybody was anxious to engage in commerce, without possessing any of the knowledge which that profession requires.' Rodman's Translation, p. 52. A true picture of nearly every revolution, especially if tainted with a depreciating paper currency.

Second cause, the defects in the laws, and the creditors not having a guide or system: 'assignees sometimes chosen by fictitious creditors, often by the friends or relations of the insolvent, almost always by a small number of creditors present, who were bought over at the expense of the absent, and who disguised the malversations of the insolvent, and the real situation of his affairs. They thus forced the hopeless

creditors to accept of a disadvantageous compromise, the effect of which was to save the bankrupt from disgrace, deprive his victims of three fourths of their property, and to leave the debtor in possession of the means of displaying an insulting luxury.' If no compromise took place, an assignment was made, and the liquidations were entrusted to men interested in endless procrastination, till the creditors, weary of delays, renounced all hope. On the other hand the orators allowed there were some honest bankruptcies, which led them to report the middle course they took. This bad state of things is yet too applicable to several States in our union.

I. Ch. 19. *Art.* 3. *Con.*

CHAPTER XIX.

ASSUMPSIT. BARON AND FEME.

§ 9. In court of errors, &c. in New York, in Jaques *v.* Methodist Episcopal Church, this court reversed this decision of Chancellor Kent, and in conformity to the English authorities, held a *feme covert*, with respect to her separate property, is to be regarded as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires the separate estate. In South Carolina a majority of the court of appeals held with Chancellor Kent. In Pennsylvania the English authorities are adhered to.

Art. 1. *Con.*

17 Johns. R. 548. Ewing *v.* Smith, 3 Desaus. Ch. R. 417. Newlin *v.* Newlin, 1 Serg. & Raw. 275.

§ 10. *He has no right to commit waste*, &c. Case for cutting and *selling* forty cords of wood on her wild lot in fee, against a judgment creditor, who had levied on the husband's life estate, &c.: held, 1. The husband has no right to commit waste on his *wife's inheritance*, though not suable therefor at common law: 2. His judgment creditor, by his levy on his right, acquires that only, that is, his right to the rents and profits during the marriage; but is liable for waste in this action by baron and feme, and any injury *to her inheritance* is *waste*. Such a levy on wild lands is useless, as there are no rents and profits. See Barber *v.* Root, ch. 46. a. 9. s. 13; Conner *v.* Sheppard, ch. 130. a. 4. s. 40. Vol. 4.

1 Greenl. 5–10, Babb and wife *v.* Perley..

The following case shows many of the rights of the wife in a court of chancery in the United States. Richard Udall impleaded with Edward M. L. Kenney *v.* Eliza S. Kenney: appeal from the court of chancery to the court of errors. The father, by deed, settled bank stock in trust in favor of his infant daughter, and chancery placed it in the hands of its assistant register, as trustee to execute the trust in her favor. She married, and chancery ordered the dividends to be paid

3 Cowen, 590—611.

I. Ch. 19. Art. 1. *Con.*

to her husband. Within a year after the marriage, and while she was an infant, she and her husband transferred the stock for a valuable consideration, the assignee knowing at the same time of the deed of settlement, and the infancy of the wife; whereon an order was made that the dividends thereafter should be paid to the assignee till the wife came of age, or the further order of the court. On a bill filed by her against her husband and assignee, the court of chancery declared the assignment null and void so far as it respected her equity; and decreed the assignee should account for the dividends received by him under the order; and the husband having misbehaved himself, the dividends were directed to be paid to the wife, until she came of age, with liberty for her then to apply for such suitable provision out of the property, as might be determined on the usual reference to a master. On appeal to the court of errors the decree was affirmed, except so much of it as directed the assignee to account for dividends received anterior to the decree; and the wife in the mean time having come of age, the record was remitted with directions to the court below to make the proper reference, and determine what would be a suitable provision, the overplus, if any, to be paid to the assignee. Intimated the $8,000 stock would be not more than a reasonable provision. See this cause at large, 5 Johns. Ch. R. 464. Material points further held in this case: 1. The husband cannot dispose of the wife's equity without making a suitable provision for her support: 2. She can dispose of it only by consent in court; or out of court, on such provision being made for her: 3. But her choses in possession, or in action, by the marriage, become his at his disposal: 4. The general rule is, that her interest or income in her equitable property may be received by him while he lives with, and maintains her: 5. He may sue to get possession of her property, at law, and equity will not interfere; but if he ask chancery to enable him to do it, it will see he first makes such provision: 6. So as to his general assignee by his own act, or by operation of law: 7. If the husband do not maintain her, or is not capable to manage his concerns, or is disposed to waste her property, the court will direct the interest to be paid to her or to a trustee for her benefit: 8. While he has a right to receive the interest or income of her property, he may legally transfer that right to another: 9. When he comes into equity to be aided in recovering his equity he must do equity. Scores of cases were cited, but almost entirely English cases.

Art. 2. *Con.*

§ 19. *Con.* John Tobler died and left a widow and several children: she took administration on his estate, and as adminis-

trix took possession of it. Before partition, she married A and died: A come into possession as administrator in her right: held, he had not such possession of *her chose in action* as to vest in him one third coming to her; but he is entitled to one third of her third under the statute of 1791. That statute took from him the right he had under 22 and 23, and 29 Ch. 2; hence, when he administered he became liable to make distribution. I. Ch. 19. *Art.* 2. *Con.* 2 Nott & Mc Cord, 147.

§ 21. *con.* Note and mortgage to husband and wife, survives to her, if she survives him, and not to his executor. 16 Mass. R. 486–488, Draper, adm'r. *v.* Jackson and wife.

Remark. The husband and wife sold her land to the mortgagor and he gave to them said mortgage and note. Judge Jackson, who gave the opinion of the court, in his question, did not notice this. The question, he said, 'is, whether a note and mortgage made to a man and his wife, shall, in case she survive him, go to his administrator or to his widow,' (except as to creditors). Judge J. considered many authorities, mostly ancient ones; as that Lib. 2. c. 5. s. 28; Com. D. Baron and Feme; 48 E. 3. 18; 1 Rol. Abr. 342; 14 E. 2; 47 E. 3. 12; 19 H. 6. 37; 15 E. 4, 9; 1 Danv. Abr. 715; 4 H. 6. 6; Noy. 149; 2 Vern. 683; 2 P. W. 496. Judge J. observes on 'a review of these cases, it does not appear that the point in question has ever been expressly adjudged in any court of common law:' rests on the cases in equity mainly, all in her favor, and the justice of her case, and in his reasoning relies much on the fact, the debt arose mainly out of *her inheritance*, in which her husband had only a small interest, that is, his right to the profits for his life at most—[no objection on account of creditors]. This case is clearly law. See in this work ch. 19. a. 2. s. 9, 12; especially art. 21. s. 5, 6, 7, 8, &c.; ch. 175. a. 2. s. 7 to 22; ch. 106. a. 4. s. 1 to 5. Many authorities to the point of this case; many cases of their joining in actions, and numerous modern authorities; but in all the right of action originating *in her*, or in *her property*, or earnings, seems to be material.

§ 3. The plt's. wife was entitled, with other, under the act of distribution of intestate estates, to a share of real estate; and a writ of partition, under the act of assembly, issued for selling the property and paying the purchase money to the sheriff. The wife then died. Held, this was not such a reduction of her choses in action into possession by her husband as to complete his right to the whole, but as his wife died without issue, he was entitled to one half under the act. She died *after* the money was paid to the sheriff and her husband applied for her part of it. Art. 4. *Con.* 2 Nott & Mc Cord, 149–153, Hood *v.* Archer & al.

I. Ch. 19. *Art.* 4. *Con.*

4 Rand. 397–405.

§ 4. *His power is limited.* He cannot rightfully elect her property be real or personal, at his pleasure. 2. When her rights appear clearly in the record, the court will, *ex officio*, protect her against any injurious effects arising from his act or admissions, whether the point be made in the pleadings or not. 3. A bill by both is his only, and she is joined for conformity to be bound only so far as in justice she ought to be bound. See 2 Ves. 663, Evans *v.* Cogan; 2 P. Wms. 451; 2 Vern. 249.

Art. 5. *Con.*

3 Rand. 434–447.

§ 7. If a wife die leaving a husband, and he dies without administering on her estate, his administrator may sue her guardian for her estate committed to him. 2. A decree may be rendered against one of two administrators, if he only has assets.

A husband cannot convey land by deed directly to his wife. 1 Greenl. 394–398, Martin *v.* Martin.

15 Serg. & R. 84, &c.

§ 8. Held, that a wife cannot be a citizen of a state different from that in which her husband has his domicil, so as to sue in the courts of the United States, and generally she cannot sue him in Pennsylvania, hence she has six years after his death to sue his executors, on a valid contract between them, as one made in Louisiania, &c.

Art. 8. *Con.*

3 Barn. & Cres. 631–639, Montague *v.* Benedict.

§ 7. *But things not necessaries, &c. Assumpsit* for goods sold and delivered. Plea, *non assumpsit.* At the trial proved that the plt., a jeweller, in the course of two months delivered articles of jewelry to the deft's. wife amounting to £83; that he was a certificated special pleader, and lived in a ready furnished house, rent £200 a year; that he kept no man servant; that her marriage portion was less than £4000; that when married she had jewelry suitable to her condition, and that she had never worn in her husband's presence any articles furnished by the plt.; that he, when he went to the deft's. house for payment, always inquired for the wife and not for the deft. Held, 1. That the said articles *were not necessaries:* 2. As there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be supported. She had paid £34 in part. Where a husband turns away his wife for adultery, he is not liable on her contracts made with persons having notice he has discarded her. See s. 13. this article.

3 Pick. 289–291, Hunter *v.* Boucher.

Art. 10. *Con.*

3 Rand. 373–393. West *v.* West's Executor.

§ 1. A man by will gives a fifth part of his estate to his executors, for the benefit of a married daughter, (who lived separate from her husband), at the discretion of his executors: he also desires them to sue said husband for £200, which, when recovered, he desired them to dispose thereof to his said daughter, to be disposed of at her discretion. Held, she had a *separate* estate in the property so given: 2. She had

power to bequeath the *personal* property, but not the *real*: I. Ch. 19. 3. Whether her paper so disposing was a will or anything else, it ought to be proved. See art. 2. s. 13, 14; art. 10. s. 3; art. 22. s. 15; ch. 114. a. 22. s. 10. Vol. 4. *Art.* 10. *Con.*

§ 1. *con.* A *feme covert* acting as a sole trader, may make a bond, but only one relating to her business as a sole trader. The husband died and left his wife some estate and she had some of her own. Held, only her own was liable to pay her funeral expenses. The bond to bind her must state she is a sole trader in the proceedings. South Carolina in this respect seems to have adopted the custom of London. 2 Nott & Mc Cord, 242—247. 1 Mc Cord, 395.

Held, that a married woman, who had long resided in Massachusetts, and her husband ever having been and still being an inhabitant of New Hampshire, and having by cruel treatment driven her from his house, might sue as a feme sole. See Gregory *v.* Paul, 3 Camb. 123. Art. 14. *Con.* Abbott *v.* Bailey, 6 Pick. 89.

§ 4. A *feme covert* may be imprisoned on a-*ca. sa.* with her husband, and so without him; otherwise as to mesne process. 3 Cowen, 239, Mc Kintry *v.* Davis and wife.

§ 5. *Cases in equity in England further.* On their contract to sell her estate, chancery will not decree him to procure her to join. She cannot by consent, though examined in court, part with her interest in a fund settled on her marriage for her separate use, during her life, with a clause against anticipation, with remainder to the survivor of them: 3. Money bequeathed to be invested in an annuity for her life and her separate use paid to him on her consent taken in court: 4. A fund in which she has a reversionary interest was transferred to a purchaser by her consent taken in court. Art. 15. *Con.* 2 Jacob & W. 425, 456, 457, 458.

§ 6. *con.* Where the wife returns her bank shares by her husband's consent, after his death, as when she owned them before marriage, the husband received the dividends till the charter expired; then the stockholders had a right to subscribe a proportion of their stock in a new bank; this he subscribed *in her name and refused to receive the surplus money, saying it was her's*, not his. After his death his executors received said surplus, and the dividends; also a sum payable on a reduction of the capital of the bank. Held, the widow was entitled to recover of the executors all the sums so received by them, with interest. The court held there was sufficient evidence the husband ever intended his wife should have the whole to her use. The husband died amply solvent, so no creditors were concerned. 17 Mass. R. 57-60.

The will of a *feme covert* bequeathing her choses in action to her husband, is void, though made with his consent. 2 M'Cord, 458.

A *feme covert*, by her next friend may, in her own name, maintain an action against the sheriff for an escape of her 1 Const. Rep. 453.

1. Ch. 19. Art. 22. Con.

husband committed by attachment for not performing a decree for alimony. See Wheeler v. Wheeler, a. 12, s. 1.

§ 8. *con.* Was an action of covenant against the deft's., and also two wives, of a lot of land to the plt., and they covenanted they were seised in fee when they were not; deed proved and appeared not to have been signed by the husbands of the two wives. Held, 1. The deeds of the wives were not binding, as their husbands did not join in them. 2. The wife's deed alone is not valid, except her release of dower. 3. It was correct to declare against the deft's. alone, omitting the wives, for they conveyed no interest. How for baron and feme must join in a deed to pass their respective interests in her land. The wife wrote 'I Sally Smith, for $100 conveyed the land to Asa Davis,' with the usual words and covenants as if she were sole; her husband added 'I William Smith, &c. for, and in consideration of, one dollar to me paid by Asa Davis, &c. for myself, my heirs, &c. *quit unto him*, the said Asa Davis, all my right and title to the above premises, against the lawful claims of any persons, by or under me.

'Signed, Sally Smith, and Seal.
'William Smith,' and Seal.

Davis was a *bona fide* purchaser for an adequate consideration; deed valid, though the husband and wife used different words of conveyance. If he signs, seals, and delivers a deed of conveyance with his wife, though he is not named in the body of the deed as a grantor, all the interests of both in the premises passed. Many cases, English and American, cited.

A deed executed by her is not binding on her, unless duly acknowledged, and an after acknowledgment by her, does not relate back to the time of the execution of the deed of her land. By a conveyance of land to them, they both become 'seised of an entirety,' neither of them can dispose of any part without the assent of the other, and on the death of either, the whole goes to the survivor. The statute sess. 9, ch. 12, s. 6, same case baron and feme seised of her lands, she died in 1795. He continued possession, claiming them as his own, built on them, &c., and in 1800 mortgaged them as his own. Held, he, after her death, was a tenant at *sufferance*, and his continuance in possession was *not adverse* to her heirs the true owners. Her estate in equity, she cannot bind herself by her covenant, or contract, hence a deed executed by her and her husband with covenant of warranty, does not estop her in ejectment sued against her after his death; but she may show her interest in the land. No action lies on the contract of baron and feme, as she cannot contract. *Quere*, as to her being estopped in such case, ch. 115, a. 4, s. 32, Colcord v. Swann, and wife.

2 N. H. Rep. 175, Ela v. Card & al.

pp. 402–405.

p. 525, &c. Elliot v. Sleeper.

New York.

Corson v. Cairns, cited sometimes Jackson v. Cairns, 20 Johns. R. 301.

id.

17 Johns. R. 548.

Jackson v. Vanderheyden, 17 Johns. R. 167.—16 do. 281.

§ 16. The court will not grant an injunction to restrain the husband from preventing his wife's solicitor and friends from having access to her, being very sick in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, it not being proved she had given instructions for such a deed. If her husband voluntarily assign a fund in court belonging to her, this will not bar her right by survivorship. I. Ch. 19. *Art.* 22. *Con.* 1 Jacob & W. 94. p. 472.

CHAPTER XX.

BILLS AND NOTES, &c.

§ 3. *con.* 1 Nott and M'Cord, 102, like authority. precise form of words necessary to make a bill or note. No Art. 3. *Con.*

Only notes payable to *order* or *bearer* for *money*, are negotiable; not those for the delivery of property by 324 of Ann, or Act of Assembly of 1798; so not one for the payment of *corn*; 1 Nott & M'Cord, 255–256: nor one for paying *paper medium*. 1 M'Cord, 115.

Judah *v.* Harris, 19 Johns, R. 144. A promissory note payable '*in bank notes current in the city of NewYork*,' is a negotiable note.

§ 9. *con. When done, note was to be negotiable. Assumpsit* on two notes, count on each note against the maker in favor of the plt. as endorsee of Jenkins and Havens, the payees in common form. They endorsed for the maker's accommodation, (deft.) on its being dishonored paid it, and took it up. Jenkins and Havens then delivered it to Havens alone with the original endorsement on it. Held, 1. that Havens alone might sue the maker (the deft.) as endorsee. 2. That the negotiable quality of the note was not destroyed by advancing the money and taking it up, unless done with intent *to pay* it. 3. However, where in such a case its negotiation may work a wrong to any persons, parties, such a payment will be deemed to extinguish the note and prevent its negotiability for the purposes of justice. See 2 Greenl. 207, s. 22. Ch. 39, a. 5, s. 2. Ch. 20, a. 20, s. 30. 4. A note *overdue* and dishonored, may still be negotiated, but subject to all the equities between the original parties. See the case of Beck *v.* Robly, a. 9, s. 7. Callow *v.* Lawrence, 3 M. & S. 95. Terra *v.* Birkley, 1 Wils. 465; 17 Mass. R. 615. So subject to equities. See a. 18, 1 N. H. Rep. 250. Note ceases to be negotiable once paid. And see s. 22. Havens *v.* Huntington, 1 Cowen, 387–397.

What is a negotiable note. An instrument in writing thus, 'due to S. R. or bearer, $200.26 for value received,' is a good promissory note within the statute of Ann. 2 Cowen, 536.

I. Ch. 20. Art. 3. Con.

A bill or note to be negotiable, must be absolutely payable in money alone, hence one in writing, by which A directs B to pay C or bearer $400, and *take up A's note of that amount*, though accepted by B, is not a bill of exchange. 6 Cowen, 108--109, Cook *v.* Satterlee.

Art. 4. Con.

1 Nott & M'Cord, 174-177.

2 Nott & M,Cord, 102-104.

§ 1 *con.* A note given in Massachusetts, as a premium note, on a policy of insurance, on a vessel engaged in the *African slave trade*, or on any such slave shipped on board of any vessel, is void by the act of the legislature of Massachusetts. So a note given for money won on a horse race, is void. So if the note be usurious; 1 M'Cord, 350.

Art. 6. Con.

2 Jacob & W. 243.

§ 1 *con.* There is no difference between an endorsement of a note by a party, and one by his personal representative. 2. And where a note is handed over for a valuable consideration, the endorsement is a form the party has a right to.

16 Mass. R. 314—317.—Russell, ex. v. Swan.

§ 8. *Assumpsit* on a note by him, made to Jeffry and Russell, partners in trade. They endorsed it to Russell, one of them. On his death, his executrix sued Swan, the maker. Held, she could so far support the action; but barred by the statute of limitations, for though attested. the attestation is so confined by the act to the promisee, (See ch. 161, a. 1, s. 10,) as not to aid the indorsee, though one of the payees.

16 Mass. R. 451.

17 Mass. R. 94—98.

If the payee endorse a negotiable note to A, he cannot maintain an action on it, in the payee's name, without his consent.

The President, Directors, and Company of the Hartford Bank v. Barry.

§ 9. *Assumpsit* against the deft., *as endorser* of a note made by B. Eaton, Jr., endorsed to said bank. Held, the cashier of a bank may endorse a note, its property, for the purpose of impowering a person to demand payment, &c., (but not to transfer the property,) it being his business, *ex officio*, to take the preliminary steps to a suit: 2. Held, Eaton could not be a witness to prove usury in the sale of it; for his signing and the sale were all, in fact, at one time, made to the broker in Eaton's business, at usurious interest. The deft. contended, the usury was after Eaton signed. It is enough the agent has the note to make a demand, without an endorsement or written power.

1 Pick. R. 401.

Art. 7. Con.

1 M'Cord, 106.

§ 6 *con.* The acceptance of an order, drawn on an agent, in possession of funds out of which it is to be paid, fixes the funds irrevocably, and is a good assignment thereof, the funds do not become *assets*, on the death of the drawer; and if the agent himself, have a *lein* on the funds, when the drawer dies, the agent may sell the property and retain his own debt, and pay the order, and not be liable as executor *de son tort:* and if the deft. accept a bill, on *condition* that certain goods of the drawer shall be sold before the bill become due, and before it is due, the goods are attached by the drawer's creditor in the hands of the acceptor, and before sold; he is discharged of his acceptance, as the law prevents the sale of the goods, and prevents the condition being performed.

1 M'Cord. 408.

§ 1 *con.* A *bona fide* holder for a valuable consideration of a check payable to bearer, addressed to a particular person, may recover in an action against the drawer, for money had and received; and 1 Rand. R. 12. 3 Pick. R. 18, Ellis *v.* Wheeler. J. Ch. 20. *Art.* 8 *Con.*

§ 1 *con.* If the demand made on the maker of a promissory note be such as he is bound by, the endorser cannot object that it was not made according to legal forms: 2. Notice to the endorser of non payment by the maker, is sufficient, if put into the post-office at any time during the day, succeeding the day the same is payable. 17 Mass. R. 449—454, Whitwell & al. *v.* Johnson, Jr. Art. 9. *Con.*

§ 9. *Bank usage* admitted, by which, payment of a promissory note is to be demanded the *fourth day*, at the banks in the district, after the time limited for the payment of it, in order to charge the endorser. This usage is admitted to be proved, in order to ascertain the understanding of the parties, with respect to their contracts, made with reference to it; the declaration against the endorser, in such case, must lay the demand on the *fourth* day, not on the *third.* Art. 10. *Con.* 9 Wheat. 581. —598, Renner plt. in error *v.* the Bank of Colombia.

Like usage of the fourth day, allowed not necessary personal knowledge of it be brought home to the endorser; no precise form of notice to him, is necessary; not necessary in it to state who is the holder, nor that the note was demanded at the bank where payable, though this fact must be proved at the trial; nor will a mistake of the date of the note in the notice, vitiate it, if enough be stated in it to give the endorser sufficient knowledge of the particular note dishonored A rule of court, dispensing with proof of execution of the note may be valid, unless the party annex to his plea, an affidavit that the note was not executed by him. 11 Wheat. 431 —441, Mills plt. in error *v.* U. S. Bank.

§ 6 *Con.* Action against the endorser of a promissory note. Held, if the maker die, the holder still is bound to due diligence to get payment from his representatives, and to search the proper offices of the district, to find who they are, and if not to be found, then a demand is to be made at the usual residence of the maker when he died; and this is sufficient, with timely notice of failure to the endorser. By usage, the demand must be on the last day of grace; protest may be the same day, and on this day, the maker may be sued; but 1 Nott & M'Cord; no demand is necessary where the note is void, as a gaming note, &c.; and do. 251–257; nor if the drawer of a bill of exchange inform the payee, the funds are withdrawn from the drawee: same doctrine as to inland bills and checks on banks. So if the drawer forbid the payment, and inform the payee thereof. See further cases as to demand and notice, 2 Nott & M'Cord, 433, &c.; 1 Nott & M'Cord, 116–120–466; 2 Nott & M'Cord, 283 to 291; 1 M'Cord, 339; 4 Rand. 164. 1 Nott & M'Cord, 438 —440.

I. Ch. 20. *Art.* 10. *Con.*

2 Greenl. 207–213; Mead *v.* Small; supports s. 9; this tenth article as to notice.

§ 9. If the maker, after making the note, move into another state or jurisdiction, it is sufficient to present the note at his former place of residence. The removal in this case, was from the district of Columbia into Maryland, about nine miles: the main stress was laid on the change of jurisdiction.

9 Wheat. 598—602.

2 N. H. Rep. 159, Dwight *v.* Emerson.

§ 13. The holder of a promissory note, cannot recover of the endorser, though negotiated long after due, unless he proves some demand on the maker, and notice to the endorser.

1 Pick. R. 401—413, Shed *v.* Brett.

§ 17 *con. Post-office notice.* Held, if the endorser live in another town, it is sufficient to put notice into the post-office, though never received: 2. If he do not live in a post town, it is, *perhaps*, sufficient to send the notice to the nearest post town: 3. He may be sued the same day the note becomes due; but *after* notice is put into the post-office, though the writ be served before the notice can be received by the course of the mail. Numerous cases cited by the court and counsel.

§ 21 *con.* Going with a promissory note, to demand payment to the place of business of the makers, in business hours, and finding it shut, is using due diligence. The contents of written notice given to an endorser of a promissory note, may be proved by parol, and without giving notice to produce the writing. In computing time, Sunday is not to be reckoned. Neither the holder or notary is bound to know where the endorser resides. If a bill be returned protested, and the drawer, on demand of payment, promises to pay it, he is held, and cannot object want of notice of the protest; 2 East, 469; see s. 55, waiver of notice; 12 East, 28; 13 East, 417; 2 Camp. 188–474.

1 Pick. R. 413—414—8 do. 180—183.

4 Rand. 164—177.

4 Rand. 553—563.

A bill is presented to the drawee, and not accepted or paid by him, notice need not be given to the endorser, if the bill be drawn and endorsed for the drawer's accommodation, with the endorser's knowledge; and no expectation the drawer would pay the bill. See art. 20, s. 49; s. 58, art. 10; Selw. N. P. 324; 15 East, 216; 4 Taunt. 731; 3 Greenl. 147–156; 11 Wheat. 171–184; 5 Cowen, 303–309, Mead *v.* Engs; what is due notice by mail, from endorser to endorser, to the maker of a bill.

4 Pick. 525—528.

§ 23 *con. Assumpsit*, endorsees against the endorser of a promissory note. The plt., who lived in New York, observed, when he received the note to the deft., who lived elsewhere, that he had no confidence in the other parties to the note, and did not know them, and should look wholly to the deft.; and he replied, he should be in New York when the note became due, and would take it up, if not paid by any other party to it. Held, the deft. waived his right of notice of the dishonor of the note, and that an attempt on the plt's part, to give such notice,

did not affect the question; and 3 Greenl. 233, Hill *v.* Merrill; 1 N. H. Rep. 143–144; days by post computed.

§ 55. *con.* And to consider him as waiving notice, he must know the circumstances and facts, also the legal effects, as his legal discharge, &c. 12 Wheat. 183–193; 4 Dall. 109; 4 Taunt. 93; 2 D. & E. 713; Starkie's Evid. 272.

And 5 Pick. 436–447—Taunton Bank *v.* Richardson & Lord *Assumpsit* on a prom. note made by Cushing & Appleton of Salem to the defts. of Boston, dated Aug. 16, 1824, for $2000, payable in 60 days and grace, at Taunton Bank, endorsed by the defts., and discounted at said bank—declaration alleged due notice to the defts. of nonpayment of the note—and a count for money had and reeeived—Held, 1. The testimony of the cashier that a letter was received by him or a director, and that each of them had searched for it, and that it was probably lost when a fire happened at the bank, is not sufficient, without the affidavit of the director also, to let in parol evidence of the contents of the letter; for the testimony the director had searched is but hearsay. 2. But if the cashier had, also, testified the letter was kept on the files of the bank, it seems this had been sufficient. 3. Presumptive evidence of the loss of a paper is sufficient to let in parol evidence of the contents. 4. In an action against the endorser of a note; proof of a waiver of notice will support the allegation of actual notice. 5. Where the endorser of a note applied to a bank to have it discounted, and promised to attend to the renewal of it, and to take care of it, and directed notice to the maker be sent to his care, and such notice was sent accordingly. Held, this was a waiver of a regular demand and notice; at least, from it a jury might infer a waiver.

§ 61. *Due notice though several days pass*, &c. As where A's traveller, a tradesman, received, in business, a prom. note, he delivered to his master, not endorsed by said agent. The note was dishonored and returned to A. He not knowing the next preceding endorser, wrote to his said agent, then absent, to inquire respecting it. Held, no laches in A, though several days elapsed before he received an answer, and gave notice to the next party, as A used due diligence in ascertaining his address.

1 Barn. & Cress 245–247, Baldwin and others *v.* Richardson and another.

§ 62. The deft., payee of a negotiable promissory note, endorsed it thus—'for value received, I sell, assign, and guaranty the payment of the within note to J. A. or bearer.' Held an absolute engagement, that the maker should pay the note when due, or that the deft. would pay it himself; hence the plt. was not bound to prove a demand of payment, and notice of nonpayment, as in common cases.

Allen *v.* Rightmore, 20 Johns. R. 365.

§ 63. When a bill is drawn payable at sight, or so many days after sight, there is no fixed rule for its presentment, but

1. Ch. 20 *Art.* 10. *Con.*

the holder must use due diligence to put the bill into circulation. Robinson *v.* Ames, 20 Johns R. 146—due notice or not, 168–176–372. 18 do. 230–327–432.

§ 64. *Liability of a bank receiving notes to collect, to give notice*, &c. When a note is endorsed and delivered to a bank to collect, it impliedly by promises, if it be not paid, to give due notice to all the endorsers, and if the bank fail so to do, the holder has *assumpsit* against it for the non-feasance; the deposit of the note, and the probable profits to arise from the money remaining in the bank after paid, being a beneficial act, and affording a good consideration to support such promise. See below.

Smedes *v.* Bank of Utica, 20 Johns R. 372; do. 367.

§ 65. The law (in Kentucky,) requires no greater diligence in giving notice of the dishonor of a bill, from the person to whom transmitted for collection at the place of payment than it requires from the endorser or holder.

2 Littell 18.

§ 66. Error from the Supreme Court to the Court of Errors—Judgment affirmed—and added, the endorsement and delivery of a prom. note to a bank, or its request, is a sufficient consideration for an undertaking, on the part of the bank, to charge the endorser by a regular notice of non-payment, and if it neglect so to do, the owner or holder so promised, may have an action against it, and recover damages for the neglect—the receipt of the note and neglect, is mismanagement. 2. An objection not made in the Supreme Court cannot be made in the Court of Errors. 3. A corporation may make any contract, to do an act, at any place, if such contract be within the scope of its general powers. 4. What is a reasonable time within which a note payable *on demand*, should be presented for payment, in order to charge the endorser, depends on the facts of the case, to be proved at the trial—note had been due 6 months when delivered to the bank. Cited for the bank; 8 Johns. 129 474; 7 Cran. 217; Chit. on bills, 350; said there was no sufficient consideration, and cited 4 Johns. R. 84; 1 Cain. R. 347; Doug. 730; 5 Johns. 430; 1 D. & E. 151. Against the bank; 2 Cowen R. 31, as to objections—as to consideration, 1 Com. on Cont. 16–17; Cro. El. 218 and 63; 70–150; Dyer, 272; 2 Ld. Raym. 909, Coggs *v.* Bernard; Stra. 1011; 2 Burr. 1159: Com. D. Pleader, 87; 1 Vent. 119; Hard. 222; Bul. N. P. 321; Barn. 452; 3 Taunt. 415; Com. D. Action on Assumpsit, B. 1–2. s. 11. 5 D. and E. 143–148.

Utica Bank *v.* Smedes, 3 Cowen, 662–685. Same case as in § 64

Art. 14. *Con.*

§ 1 *con.* A note payable to A or order, cannot be sued in the name of an endorsee, unless negotiated by the same, A meant to be the payee: 2. Where no particular person of that name was intended to be the payee, or had any interest in the note, the name of the payee is to be viewed as *fictitious:* 3. In such cases, where money passed between the parties to the action, a recovery may be had on the money counts: 4. And when it did

2 N. H. Rep. 446—448, Foster *v.* Shattuck. & al.

not pass between them a recovery can be had on a count, alleging the note to be payable to bearer. Many cases cited; and 1 N. H. Rep. 286–289, as to blank endorsements, &c. I. Ch. 20. *Art.* 16. *Con.*

§ 4. A. D. 1829. Mr Angel states damages further, to be thus: 'the rule for instance, in New York, *has been*, that the holder of a bill drawn there, at a place out of the United States, protested for non acceptance or non payment, is entitled to recover of the drawer or the endorser, the amount of the bill at the rate of exchange, or the place on which the bill was drawn, at the time of notice given to the party, to be charged, and *twenty per cent.* damages on the amount of the bill, at the rate of exchange; the expenses of protest, and interest on the aggregate amount of the bill and damages from the time of notice given.' The former construction, &c., speaking of foreign bills, refers for the present construction to Graves *v.* Dash, in error; 12 Johns, R. 17, which is thus: the holder of a bill of exchange, drawn in New York, on England, returned protested for non payment, is entitled to recover of the drawer or endorser here, the contents of the bill, *at the rate of exchange*, or the price of bills on England at the time of the notice of the dishonor of the bill, with twenty per cent. damages, and interest: the rate of twenty per cent. is also the rule in Missouri, Alabama, Louisiana, Illinois, Connecticut, and Delaware, on bills payable out of the United States. In Pennsylvania, twenty per cent. on a bill payable in Europe; in Madeira, Spanish Maine, or Mexico, fifteen per cent.; in any other place out of the United States, twentyfive per cent. interest on the amount of the bill, damages and charges of protest, from the time of notice; in all these cases, the amount of the bill and damages is ascertained by the bill of exchange, or the value of the currency mentioned in the bill at the time of notice.

In Maryland, on a bill payable out of the United States, the value of the bill is recoverable at the rate of exchange; fifteen per cent. on the value, damages, costs, and protest, and interest on the value of the principal sum in the bill, from the time of the protest.

In Ohio, Indiana, and S. Carolina, damages fifteen per cent.

§ 4. A note is endorsed to a person absent, and sued before he returns, he assents to the action after his return, this sustains it; 3 Greenl. 73, s. 75, see Bowman *v.* Wood, a. 21, s. 95. a. 21, s. 19–49, a. 10, s. 49; 3 Cranch. 208; 11 Johns. R. 52. *Art.* 18. *Con.*

§ 2 *con.* As to negotiable orders, where a note given for the balance of an account does not discharge it. *Art.* 19. *Con.*

§ 33 *con.* If A subscribe a promissory note, and add to his signature the words 'agent for B,' A is not liable on his own promise, if authorised, &c.: if not, he is liable in a special action, on the case stating the facts. *Art.* 20. *Con.* 16 Mas. R. 461.

I. Ch. 20. *Art.* 20. *Con.*

§ 36 *con.* When a note has been once paid, it ceases to be negotiable, and the endorser is a witness to prove payment, &c., before endorsement, this the endorsee knew, cited Chitty on Bills, 253; Blake *v.* Sewall, a. 3, s 22, a. 3, s. 9, a. 20, s. 50. 2 N. H. Rep. 212.

Sice v. Cunningham & al. 1 Cowen, 397 -411.

§ 45 *con.* Promissory note payable *on demand*, is due presently; and to charge the endorser, payment must be demanded of the maker, and notice of non payment must be given to the endorser, within reasonable time after the date: 2. What is such, when the facts are ascertained, is a question of law the court decides: 3. Five months' delay is too long when all the parties reside in the same city. Numerous cases cited, near all found in this chapter, added the common doctrine, that if the endorser makes an offer to pay, &c., it has no effect, unless the plt. shows affirmatively, he made it, knowing all the circumstances of the case, as to reasonable time, &c.; also ch. 50, s. 16, and cases there cited, and 4 Barn. & Cres. 330.

2 N. H. Rep. 171-174, Moody v. Leavett.

§ 50. *Assumpsit* on a note conditionally made void; as where A made a note payable to B or order, at a future day, and, under the note, an agreement was written and signed by A and B, that A should do certain acts by a certain day, which acts being done, B to relinquish all claims on the notes, and the note and agreement were lodged in C's hands, who was to deliver the note to B, if A failed to perform by the term stipulated, and A failing, C separated the note from the agreement, and delivered it to B, who endorsed it to D; D as endorsee, recovered against A. A note given for a breach of covenant, pays for it, &c. Note once paid, ceases to be negotiable, and the endorser is a witness to prove part payment before the note was negotiated. See a. 3, s. 9, a. 20, s. 36. This case shows, 1. That a contract may be made and signed, and below, a condition may be annexed and signed, all one contract conditional; but if the contractor do not perform the condition, and thereby the first part, the contract, becomes absolute, the second part, the condition, may be taken off, and leave the first part valid by itself. 2. That a note, or any other *negotiable* contract, once fairly paid or satisfied, ceases to be negotiable, then, 3. it becomes like other contracts, and any endorser on it becomes a witness.

p. 212.

Art. 21. *Con.*

§ 5 *con.* If a note be on condition, the condition and whole contract must be stated in the declaration, that the deft. may know to what he is to answer; and when the condition is not so stated, throws a fatal variance between the declaration and evidence. See the next preceding case. It appears to me the condition, not performed, in such case ought not to be taken off, but remain, and the whole contract declared on, stating the non performance of the condition.

4 Pick. 83-87.

§ 42 *con.* A party who has put his name to a negotiable security, is not a competent witness to prove that at the time he gave it currency, it was void. This was acquiescing in Jordan and Lasbrook; for this and other reasons we may consider it doubtful law, at least. 1 N. H. Rep. 60, Houghton *v.* Page. I. CH. 20. *Art.* 21. *Con.*

§ 52 *con.* A merchant in New York, sold goods there, and received the purchaser's *negotiable* note in full, for the goods held in Massachusetts, no payment of the account, because so is the law in New York: the court must have understood there was no actual agreement to take the note in full discharge of the account, for if so agreed it was payment, as any account or simple contract may be paid and discharged by actual agreement of the parties, founded on a good consideration, and the notice is this—expressed to be for value received. 3 Pick. 12–14, Vancleef *v.* Therasson & al.

§ 67. The endorsee of a negotiable note sued the maker. It was fraudulently endorsed by the payee after it was dishonored. Under the general issue, the deft. was allowed to prove, the payee gave notes to him, the maker, before the endorsement, which notes, given by the payee to the maker, were for monies received on the note made by him: 2, And nearly the same principle, as in an action by the endorsee against the maker of such note, endorsed when over due, the deft. may show in defence, a negotiable note made to him by the payee, on proving it was intended as evidence of a payment of the note in suit: 3. So he may file in a set-off of such a note made to him by the payee before he had notice, the note in suit was assigned: 4. But if he do not file such note in set-off, nor prove that it was given as evidence of payment, he cannot use it in his defence: 5. It is no objection to such set-off, that the deft. has sued the note filed. When a note is expressed for value received, it may be proved there was no consideration as between the parties. 5 Pick. 223. p. 312, &c. Sargent *v.* Southgate. id. p. 391.

CHAPTER XXI.

BILLS OF LADING.

§ 2. *con.* The vendor's right in cases of insolvency, to stop goods for the non payment of the purchase money, is confined to cases where the goods are still *in transitu* to the vendee. 2 Mason, 236—240, Conyer & al. *v.* Ennis and others, administrators. ART. 1. *Con.*

§ 6. The property in goods in a bill of lading passes by the assignment of it, *bonâ fide*, for a fair consideration, and vests the legal interest in the assignee, though assigned immediately after the arrival of the vessel in port. 2. The ship- Chandler *v.* Belden, 18 Johns. R. 157.

I. Ch. 21. Art. 1. Con.

owner having no *lien* for freight, after the bill was so assigned, sold the goods at auction to pay the freight. Held, his sale was a conversion, and he was liable in trover at the suit of the assignee of the bill of lading.

Art. 2. Con.

§ 7. *con.* To the same point, stopping goods *in transitu*, and 2 Pick. 206—214, Parks *v.* Hall.

Select items from the Com. Code of France, art. 281 prescribes what it must contain, minutely and clearly: art. 282 directs four originals at least; one for the shipper, one for the consignee, one for the master, and one for the owner of the vessel—all to be signed by the shipper and master in twenty-four hours after the delivery of the goods on board. In the same time the shipper must furnish the master with the custom house certificates for the goods shipped. By art. 283 this bill, so formed, is legal evidence between all the 'parties interested in the shipment, and between them and the insurers.'

CHAPTER XXII.

BY-LAWS AND CORPORATIONS.

Art. 1. Con. 4 Barn. & Cres. 781.

§ 10. *con.* The power to make by-laws is incident to the whole body of every corporation, and therefore if a charter give a select body a power to make them touching certain matters therein specified, that does not take away from the body at large their incidental power to make by-laws, touching other matters not specified in the charter.

5 Cowen, 436.

The elections, &c. in corporations. Case of Holmes and ten others. Motion to establish the election of Zebedee Ring and twenty-four others, who, as the mover claimed, had been chosen directors of the Tradesmen Insurance Company, in the city of New York, on affidavits, &c.: was incorporated March 14, 1825. Points decided or admitted, 1. Notice of a motion under the act to facilitate proceedings against incorporated companies, &c. Sess. 48. ch. 325. s. 9. which draws in question the election of directors of a company, is sufficient, if served on the directors whose election is questioned: need not be on those whose seats are not questioned: 2. Nor need notice be given to persons whose right to vote is in question: 3. The proceedings are in the first instance the same as upon an ordinary non-enumerated motion, and counter affidavits need not be served: 4. One in whose name stock stands on the books of such company, *as trustee*, cannot vote on such stock; the vote belongs to the *cestui que trust*: 5. A company cannot hold its own stock, so as to give its directors, or

trustees, a right to vote upon it: 6. But it may take its own stock in pledge or as security for a debt due to it, where this is necessary: 7. Form of a rule for setting aside an election of directors, and ordering a new election pursuant to the statute sess. 48. ch. 325. s. 9.

Vernon Religious Incorporation, Trustee thereof, *v.* Hills, 6 Cowen, 23—27.

The deft. cannot show the corporation has forfeited its rights by misuser or nonuser: the forfeiture can be taken advantage of only in the people's suit. The trustees *de facto*, as in other corporations, though irregularly elected, yet are in *colore officii*, and their proceedings are valid till they are ousted by judgment at the suit of the people.

New Jersey Bank *v.* Thorp, 6 Cowen, 46—47.

Held, a foreign corporation may sue in the supreme court of New York, and if, after action commenced, the act of incorporation is repealed, and its property vested in trustees, who are authorised to sue and be substituted for the corporation for suits brought, on motion, the trustees may be admitted parties to the suit instead of the corporation. The statute which repealed the charter of the bank vested its property in three trustees. See 4 Johns. Ch. R. 370, 372; 8 Wheat. 464—495, Society, &c. *v.* New Haven; 4 Cowen, 529—530.

In Massachusetts general bank act of February 28, 1829, there is a proper clause (new) authorising the banks 'to bargain, sell, and dispose of' their real estate.

15 Serg. & R. 178.

Statute in Pennsylvania granted writs of attachment against foreign '*persons*,' and the question was, whether a foreign attachment lay against a corporation created by a statute of a sister State, as Massachusetts, &c. The plt. issued a foreign attachment against the Commercial Insurance Company of Boston and attached property of it in the hands of A and B, as garnishees: motion to dissolve the attachment, because issued against a foreign corporation. It seems to have been held by a majority of the court that the attachment was valid. Duncan, J. dissented. He thought 'persons,' in the act, meant *natural* persons, and cited 16 Johns. 6. In several books a corporation is considered a moral person. In this case, as in scores of others, Pennsylvania calls Massachusetts, for instance, a *sister* State, yet views her as a *foreign* State. It seems hardly consistent that two *sister* States should be *foreign* to each other. It seems we have, in some measure, to learn the true relation of our States to each other and to the Union. It seems strange that *sister* States should be *alien* to each other.

§ 32. *con.* It may be observed in this case there was no plea in abatement, that some of the subscribers, so promisors, were not joined in the action; nor was it noticed by court or

I. Ch. 22. Art. 1. Con.

counsel that the plt. as *one of the subscribers*, was *one of the promisors*, so one partner suing the rest, &c. See ch. 52. a. 1. s. 5, this last circumstance defeated the plt's. action. 1 Barn. & Cres. 74. 3 Greenl. 187 : case of a joint fund, &c.

20 Johns. R. 89, Mc Auley v. Billenger.

Subscription on condition valid. The deft., with others, in writing, engaged to pay the several sums they subscribed to the plts., a committee, appointed by the members of a church to obtain subscriptions, and contract to repair it. In the writing was a *proviso*, to be void if a sufficient sum was not raised to repair it: the committee contracted with A to repair the church, who took the subscription, about half the sum, in payment, and agreed to raise the residue by a sale of the pews, he was authorised to do so. Held, the deft. was bound to pay his subscription. See ch. 143. a. 5. s. 37. Vol. 5 ; 5 Pick. 506—509.

§ 34. If one subscribe a share in a corporation he is not bound, unless the corporation be held to allow his share. Collin's case above : additional authorities, 11 Mass. R. 118 ; 14 Id. 172 ; 2 Pick. R. 579 ; 2 N. H. Rep. 385.

4 Rand. 186–188, Farmer's Bank of Virginia v. Reynolds.

§ 47. *con.* Held, 1. Where a bank note is cut in two and one half sent by mail and lost, the holder of the remaining half has a right to recover the amount of the note of the bank, proving ownership and giving good security to indemnify the bank ; but if these conditions be not performed by the holder until *after* the suit is brought, he shall not recover of the bank interest or costs. See 16 Mass. R. 9–16.

§ 48. *con. Bank not liable as to special deposits*, &c. *Assumpsit* for money had and received, ($50,000,) by Essex bank of the plt's. testator : First suggestion, that pending the action the charter expired. Held, the stat. of June, 1819, made before the charter of twenty years expired, enacting that all corporations then existing, (as this was,) or to be established, whose powers would expire at a given time, should be continued in existence, as bodies corporate, three years after the time limited by their charters, for the purposes of suing and being sued, settling and closing their concerns, and dividing their capital stock, but not for continuing their business, for which they were established, was a constitutional statute ; and the defts. held to answer, &c.

16 Mass. R. 245 to 274, Foster & al. ex'rs. v. The President, Directors, & Co. of Essex Bank.

17 Mass. R. 479 to 514, is the same case, and decided the bank was not liable for a special deposit, without any special undertaking, and without reward, though lost, except in case of gross negligence, which is equivalent to fraud in its effects on contracts ; nor in this case where a cask of gold coins was deposited in the bank for safe keeping, and receipted for by the president and cashier, and the gold was fraudulently taken

out by the cashier. As to special deposits the corporation is bailee. Discounting on deposits in a bank for safe keeping applies to *general* deposits only.

Where a bank paid notes on which the president's name had been forged, neglected fifteen days to return them, held, it had lost its remedy against the person from whom the notes had been received. 17 Mass. R. 33 to 46, Gloucester Bank v. Salem Bank.

§ 51. *con.* Trespass for assaulting, beating, and wounding the plt. and imprisoning him, &c. Held, under the statute of 1808. ch. 65. s. 6, the execution against a manufacturing corporation, an officer levies on the body or estate of a member of it, must be the same execution on which the officer made demand on the president, &c., and the member so levied on must have been such at the time of the levy; but the statute of 1817, c. 183, has altered the law; and 17 Mass. R. 333–336, members, how liable; see ch. 173. a. 1. s. 12. Vol. 5. 16 Mass. R. 389–392, Leland v. Marsh.

The real estate of a manufacturing corporation may be assessed in a parish tax. 17 Mass. R. 53—55.

Manufacturing corporation was formed under the act of March 22, 1811, ceased to act as such, was indebted and without funds, is dissolved within the intent of the act, so far as to give a remedy to creditors against the individual stockholders: 2. This is not prevented by electing trustees to no apparent purpose but to keep the company in existence: 3. The corporations are of a new and peculiar character: 4. A judgment of dissolution is not necessary, &c.: 5. The suit is properly in equity, the necessary contribution, constituting the case one of equitable jurisdiction. The bill was by creditors against the persons composing said corporation, charging a dissolution of it, and seeking payment from the said persons, 'to the extent of their respective shares of stock.' The main question was, is this company dissolved? The defts. contended there must be a *judicial* dissolution to justify the course the plts. were pursuing. The principal reason for holding the corporation dissolved for the purposes of the suit, were, that it was in some measure a partnership; that the State had no interest in it, and especially that the creditors had no power over a judicial prosecution, nor any remedy against the stockholders personally until after the corporation was dissolved to all the purposes of this remedy; so it was said the remedy was at law: this does not appear to have been much relied on, &c. 1 Hop. Ch. R. 300–305, Penniman & al. v. Briggs & al.

20 Johns. R. 669, a like principle. A corporation was created in March, 1817, gave a bond under its seal, on which judgment was entered in May, 1817, viewed as dissolved in February, 1818: held, the judgment was binding and

I. Ch. 22. *Art.* 1. *Con.*

conclusive on the members individually to the extent of their individual shares. The bond was given by the trustees as agents of the corporation; and 2. Held, they could bind the individuals to the extent of their respective shares in case of a dissolution of the corporation: 3. Held, the individual stockholders, who on such dissolution, became liable for said judgment, could not impeach the consideration except for fraud, or imposition, or mistake. Id. Dissolution is a matter at law, at the suit of the government. 19 Johns. 456—474; 19 Johns. R. 60. Corporation has no power but what the statutes give it. Utica Ins. Co. *v.* Scott, 19 Johns. R. 1; and sec. 4.

16 Mass. R. 94—102, the Chester Glass Company *v.* Deway.

§ 53. *Assumpsit* to recover the price of a share in this company's stock, the deft. subscribed for and failed to pay, &c. Certain persons associated in writing to carry on this manufacture, and were afterwards incorporated therefor—after this, one subscribed the writing and thereby became a member, and was held to pay his subscription: 2. It being agreed originally, if a further sum should be necessary, the subscribers should be assessed in proportion to their subscriptions. Held, the only remedy for such assessments was to sell the shares: 3. If such a company refuse to give a certificate to a stockholder entitled to it, he does not thereby lose his rights: 4. A member cannot object an irregularity in warning their first meeting in an action against him for his subscription money after organised, and having done business several years: 5. If such a corporation set up a store for the sale of merchandize generally, and sell such on credit, a purchaser cannot object to an action for the price of the goods sold to him, and say they were prohibited by law to carry on such trade; the court said the legislature did not mean to prohibit the sale of goods by the corporation to the persons employed by it, and the legislature can enforce the prohibition by causing the charter to be revoked, &c.

1 Pick. R. 297–309, Canal Bridge *v.* Gordon. Held, a corporation can be bound, without a vote or deed, by implication for corporate acts.

1 Pick. R. 372–375, the Episcop. Charitable Society *v.* the Episcopal Church in Dedham.

§ 54. The principles of this case seem to be: 1st. a corporation is formed in one shape, under a private act of the legislature [1794;] then, [1818,] this act is repealed, and the persons, generally of the former corporation, by another act are made a body politic in somewhat different shape or form; the new corporation is answerable for the debts of the old one and entitled to its property, especially when the new one acts accordingly: 2. If persons hired money for the old corporation, and gave a note not strictly empowered so to do; but it received the money and used it, and at times paid the interest accruing on the note; it became the debtor; at any rate on the money counts liable to pay.

§ 55. The Stat. of 1808, ch. 65, authorizes the levy of an execution against a manufacturing corporation on the bodies and estates of individual members in a certain case, extends not to the estate of one deceased, who died before the action was commenced. 17 Mass. R. 64, 65. I. Ch. 23. Art. 1, *Con.*

§ 56. The seal of a corporation is not necessary to give validity to an agreement for the sale of real property. See § 31, 5 Munf. 324. 3 Rand, 136—147.

§ 57. A statute granting corporate powers is inoperative till it is accepted; but when accepted it becomes a contract: 2. If a bank charter expire, it may be revived in all its original force by a subsequent statute: 3. Such subsequent act merely revives the former corporation, and does not create a new one. See the reasons, Foster *v.* Essex Bank. 1 Greenl. 79—82.

§ 58. *Assumpsit* lies against a corporation on the simple contracts of its authorized agents when acting within the scope of the legitimate purposes of such incorporation: 2. May bind itself without its seal: 3. Is included in the word *person*, and may give a negotiable note, 1 R. L. 151, without any powers therefor in their act of incorporation, and one endorses it thus: 'A. B. agent," he is not liable as endorser. Though no proof he was agent, as he may limit his endorsement. Motte *v.* Hicks, 1 Cowen 513—543.

CHAPTER XXIII.

CARRIERS.

§ 5. *con.* Art. 103 Com. Code of France makes him answerable for the loss of the goods received by him to be carried, except in cases of superior force, (de la force maguere.) He is liable for all damages but those that proceed from the perishable nature of the article, or from superior, or as some translate, irresistible force. This being liable for losses in all cases except they are by *the act of God or public enemies*, seems peculiar to the common law only, and for about three centuries only; and the French principle is the same by land and sea. See also ch. 52, art. 6, sect. 24, 25, 26, Vol. 2. Art. 1. *Con.*

§ 8. C.J. Holt in Coggs *v.* Barnard, Jones Appendix 13, said, 'as to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is, also, bound, to take the utmost care, and to return the goods when the time of the hire is expired.' '*Utmost care*'—Jones, p. 86, Am. Ed. of 1828 on bailments, objects jealously against these words, (See ch. 17 a. 20, s. 6, and contends the *hirer* is held only to an *ordinary* degree of diligence, because the letter to hire receives a *quid pro quo*, there is *mutual* benefit. Jones clearly is right if he excludes *common carriers*. He traces Holt's error up to Gaius, a Roman lawyer, through Bracton; it seems Gaius alone improperly used *diligentissimus*.

I. Ch. 23. *Art.* 1. *Con.*

§ 9. 1. Count in trover: 2. Charging the defts. jointly as common carriers, and stating their undertaking to carry for the plts. a package containing bank notes, their property, from N. to P. for hire: 3. Count alleging the defts. undertaking to carry the package for a reward, and charging them with negligence in the transportation, whereby the notes were lost: defts. pleaded the general issue. Held, 1. The practice of conveying for hire in a stage coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers: 2. Held liable, as partners, for the loss of such a parcel by the driver, who was one of the proprietors.

1 Pick. R. 50–57—Dwight v. Brewster & al. Partridge v. same.

§ 10. *What is his delivery of goods or not.* A delivery of a parcel of iron to a carrier, to be carried by him to B the vendee, in the country. The carrier having arrived at B's premises, landed part of the iron on his wharf, but finding B had stopped payment, reloading the same on board his barge, took all the iron to his own premises. Held that this was no delivery of any part of the iron, so as to divest the consignor of his right to stop *in transitu* the special property remaining in the carrier until the freight for the whole cargo, was tendered or paid, or until he had done some act, shewing that he had assented to part with the possession of the goods without receiving freight. The consignee did not take possession of the part landed, nor was the iron weighed in order to ascertain the freight, and none was tendered or paid—Bailey J, 'In order to divest the consignor's right to stop *in transitu*, there ought to be such a delivery to the consignee, as to divest the carrier's lien upon the whole cargo.' In this case nothing was done to divest it.

Jones, Am. Ed. 1828, pp. 103, 104. 1 Barn. & Cres. 181–186.

1 Maul. & S. 211; 5 B. & A. 343; 4 do. 32; 2 Show. 128; Jones Am Ed. 1828, p. 104.

Art. 2. *Con.*

§ 5. *When the carrier is deceived:* further cases, the law is settled in cases, where the carrier gives notice, beyond an amount or goods named, he will not be answerable, unless truly informed and paid accordingly. And this notice whether public or individual comes to the owner's knowledge, the carrier is not liable, in case of loss, whenever not truly informed, as in *Boston v. Donavan*, 4 B and A 31, &c.; the carrier had given notice within the plt's. knowledge, that he would not be accountable for bills, bank notes, &c. unless notice was given and an additional premium paid: but the plt. delivered to the carrier a banker's parcel, containing such bills and notes to a large amount without disclosing the nature or value of the contents; the parcel was lost. Held, the plt. having knowledge of the notice, was bound to have informed the carrier of the value in order to render him responsible. This concealment or deception is a legal fraud.

Jones, Am. Ed. 1828.

So En. Bignold *v.* Waterhouse, 1 M. & S. 261. The carrier gave *general notice* not to be responsible for articles

of a particular description, and goods of that description are delivered to him; whether he is to receive a reward or not the nature and value of the parcel must be made known to him, to enable him to adopt proper precautions for its safety—but, general notice must be brought home to the knowledge of the employer. He must know his risk and be paid a *reasonable* premium for it, cases above, &c. 3 Taunt 272–8, do 146; Smith *v.* Horne; 2 Camp. 415; 14 East. 475, 16 do. 244. Beck *v.* Evans; 4 B. & A. 32; 2 Show. 128; 4 East, 371; 5 id. 507. I. Ch. 23. *Art.* 2. *Con.* 5 B. & A. 348, Sleat v. Fogg. Jones, Am Ed. 1828, p. 104. f.

§ 8. *con.* Case against the deft's. as carriers for the value of bank notes sent by their coach. The plt's. silk warehousemen in London, employed one Hughes, as their agent to collect their debts in the country, and the deft's. were coach proprietors, and had given notice that they would not be accountable for parcels containing bank-notes (and many other articles named.) Hughes having no knowledge of such notice, delivered a parcel containing bank-notes to their driver, to be carried to them in London; the parcel was lost; they had knowledge of such notice. Held, it was their duty to have instructed their agent not to send bank-notes by that carriage. Judgment for the deft's. Two points were decided in this case: 1. That carriers may limit the responsibility by special public notice: 2. 'They must prove that the party sending the goods had knowledge of this notice,' a 3d point, 'The knowledge of the principal is the knowledge of the agent.' The notice was a printed paper delivered to the plt's. in a prior case, so connected with the charges, &c. that they must have seen the notice. 5 Barn. & Cres. 504. Art. 3. *Con.* 3 Barn. & Cres. 601--604, Mayhew & al. v. Eames & al.

Case lies against the three proprietors of a stage coach, for carelessly managing it and their horses, so that the plt's. leg was broken, &c.; though one of them was driving, and the jury found the injury was done through his *negligent* driving; but the plt. might have sued him alone in trespass perhaps. 4 Barn. & Cres. 223.

Held as to goods imported and carried, illegality of importation, &c., is never to be presumed, and the deft. to raise the objection, must prove the goods were not entered. 5 Barn. & Cres. 758.

If a master who has signed a bill of lading deliver back the goods, he ought to have all parts of the bill of lading delivered up to him, for if any one part has been transmitted to a third person, he may have acquired an interest in the goods. 6 Barn &. Cres. 36, Thompson v. Trask.

§ 1. *con.* In case of a loss, the carrier must show the cause; not enough he shows it was in a place of danger. He must show he was prepared for it to a common intent; his vessel, boat, or carriage, fit and proper; his pilot competent and careful, his hands sufficient in experience and strength. Art. 7. *Con.*

I. Ch. 23. *Art.* 7. *Con.*

Jones, Am. Ed. 1828; Murphy, Brown, & Com. *v.* Staton, 3 Munf. R. 289; Bill *v.* Reed, 4 Binn. R. 127; 1 Cons. R. S. Car. 114--311. Negligence or not is a question for the jury. 10 Johns. R. 1, 6 do. 160; 5 Day's R. 415; 1 Johns. R. 232; 1 Con. R. 487.

If a vessel of a common carrier strikes on a rock, not generally known, and the master did not actually know it, and if he conducted himself properly, and no fault imputable to him, he would not be liable; *secus*, if the loss be imputable to negligence, as if the master be ignorant of the navigation of the river, and have not a pilot on board. Williams *v.* Grant, 1 Con. R. 487; 11 Johns. R. 107; 15 Johns. R. 39; 5 B & A, 57.

CHAPTER XXIV.

CHOSE IN ACTION.

Art. 4. *Con.*

§ 26. But the assignee must use due diligence to obtain payment of the obligor. 1 Call, 497; 2 Wash. 219. The assignor is liable only for what he receives, when that is proved, when not for the amount of the bond, id. The assignee of the bond is in no better situation than the assignor. 3 Munf. 68; 4 Munf. 496.

5 Munf. 456; 6 Munf. 15–315, 391, 448.

CHAPTER XXV.

CONSIGNMENT.

1 Mason.

§ 21. Every shipment of goods remains at the risk of the shipper (consignor) except there be an express or implied authority to change the property, and put the shipment at the risk of the consignee.

4 Pick. 371—374, Chickering *v.* Fowler.

§ 22. *How goods may be left for the consignee.* A master of a vessel promises to deliver goods to the consignee; this does not require him to deliver them to the consignee personally, or at any particular wharf. He may leave them at some usual place of unlading, giving notice to the consignee they are so left: 2. If, after such notice, the consignee refuses to receive them, the master must take care of them for the owner, unless the consignee is under obligation to receive them, in which case they will be at his peril.

CHAPTER XXVI.

CUSTOMS AND PRESCRIPTIONS.

§ 3. *con.* A custom to take fish *in alieno solo* in a river not navigable, is bad: If good, it must be pleaded specially, and even a suit before a justice for it, affects title to land: must if at all be claimed by prescription in a *que estate.* 4 Pick. 145--148; Waters *v.* Lilley.

§ 11. *con.* The custom as to the way going crop, is in full force in *Pennsylvania*, as to a tenant for a term certain, whether or not noticed in the lease; and he may have trespass for it, against the landlord or his vendee, after the lease has expired. So the lessee's right remains, though one gets possession by a *habere facias possessionem* on a judgment in ejectment. And the lessee for years in trespass for cutting and carrying away his grain, may prove the custom, though not stated in his declaration, nor mentioned in his case. 2 Serg. & R. 14; 5 Binn. 285--289. Biggs. *v.* Brown, 2 Serg. & R. 14. 5 Binn. 285.

§ 16. In the whaling and fishing business, the fishermen &c. have shares instead of wages, and the owners, and sometimes the master, supplies them with necessary articles, and charges them in account made up of the voyage, for the fare or for the season, &c. This, it seems, is a good custom or usage; and there is a lien on the shares. 3 Pick. R. 115-124, Barney & al. *v.* Coffin.

§ 17. *Restraint of trade.* Debt on a bond; on oyer the condition was, if the said S. shall, from this time, cease to have any concern in the business of boating on Connecticut River, and shall give them all the freighting of his goods, wares, and merchandize, up and down C. river, at the customary freight, and to be paid in goods at the usual price, and shall aid and continue them in their business, and shall not directly nor indirectly promote any other boatmen, to compete with them in the business of boating, then this bond to be void, &c. Held, this bond was for a good consideration and not void, as being a *restraint on trade.* 3 Pick. R. 188-194, Palmer & al. *v.* Stebbins.

Another whaling custom for two ships to join stocks, &c. held a good custom. 3 Pick. 435--441; Baxter & al. *v.* Rodman.

§ 18. *Constitutional law.* Held, the legislature has authority to enact, that the interest an inhabitant of a city has in a penalty for the breach of a by-law thereof, shall not disqualify him to act as a judge, juror, or witness, in a prosecution to recover such penalty. Stat. 1824, ch. 28, s. 4: 2. It is for the court to decide, if a by-law be unreasonable or not: 3. It is no objection to the case in question, that it is confined in its operations to the city of Boston. The legislature has 3 Pick. 462--175, Commonwealth *v.* Worcester.

1 Ch. 26. Art. 2. Con.

power to enact laws local and limited in their operations: 4. Stat. 1817, ch. 50, authorizes the prosecution in the name of the Commonwealth. The law violated, required persons driving carts, wagons, sleds, &c. in the streets of Boston, to 'drive their beast or beasts, a moderate foot pace,' and not in a gallop or trot.

Art. 6. Con.

2 Barn. & Cres. 54--64, the King v. Joliffe.

§ 23. *Quo warranto.* Held, a regular usage for 20 years unexplained, and uncontradicted, is sufficient to warrant a jury in finding the existence of immemorial custom. Here the jury, as the case should be, *presumes* such custom; the judges alone, do not decide the case. There is no question but that a *jury* may presume a custom, or deed, or grant, on a peaceable unexplained possession or usage for 20 years, or even less time, against him who has so long acquiesced constantly, and where it has been for his interest to make his claim or objection, if he, in that time, has had any right so to do. My objection is, and ever has been, to the judges deciding in such cases *without a jury.* The judge may leave the jury to presume or not, according as the evidence may be, still it is ever a matter *of presumption*, which as much belongs to the jury, as the law does to the court, and so I conceive the numerous cases on this subject may be explained.

CHAPTER XXVII.

DAYS, DATES, &c.

Art. 1. Con.

4 Har. & M' H. 72.

§ 2. *con.* A note dated Sept. 19, 1795, payable in 12 months after dated, is suable Sept. 20, 1796. Here, 12 months mean a year, and the note was suable the 20th, excluding the day of its date in the computation.

When an officer gave a deed of a right to redeem &c. after sun set of a certain day, this day was excluded; see ch. 112, a. 7, s. 21, vol. 1; see ch. 96, a. 1, s. 25; where the court will notice the *fractional parts* of a day, as to judgments rendered, mortgages given, executions delivered, &c.

2 Mason, 475, Potter v. Mar. Ins. Company.

§ 9. *Two instruments dated the same day and executed the same.* Proof is admissable to show which, in fact, was executed first, as two policies, and if executed both at the same time the assured may recover the whole loss on either, if large enough to cover it. In this case it was proved the policy sued, was executed in the morning, and the other in the evening of the same day. Judgment for the plt.

1 Nott. & M' Cord, 405-407.

§ 10. *Fraction of a day.* If two judgments or executions be of the same day, neither has the preference, but it is otherwise as to vested rights acquired by operation of law, or by

contract, as if two mortgages be made the same day, the exact time at which each is executed may be proved; or a judgment obtained; as the rule of law that *fractions* of a day are not to be allowed, applies rather to legal proceeding, or to legal diligence, than to questions of right unconnected with them, and 1 M'Cord, 399. 1 Ch. 27. *Art.* 1. *Con.*

§ 11. Many cases as to the computation of time: 1. Where this computation in a statute is to be from an act done, the first day is excluded; as where an appeal is to be made in so many days: 2. No general settled rule in England. In the case of Lester's will, security to a certain purpose was to be given in six calendar months after his death. He died Jan. 12, in the evening, and the security was given July 12, in the evening, and adjudged good, and it was observed the day of his death was excluded. Numerous and able counsel argued this cause, and cited many authorities, and they agreed the day on which an act is to be done, or an event is to happen, may be in the computation of time *included* or excluded, depending on the reason of the thing according to the circumstances. Dean's case was an appeal to be in four days from a judgment of the Common Pleas, rendered Sept. 12, bond given the 16th, too late if the 12th, the day of the act done, was to be *included* in the computation of time; held *excluded;* was decided under the Statute Sess. 41, ch. 94, s. 17. The authorities cited are found in this chapter generally. Dean's Case & Notes, 2 Cow. 605—615. 15 Vez. 248, Lester v. Garland. See 1 Wills. 126, 2 Wills. 165, Cowp. 189; Sims v. Hampton, 1 Serg. & R. 411; Browne v. Browne, 3 Serg. R. 496, 15 Mass. R. 193.

§ 12. The law does not notice the fractions of a day, as between the parties, in order to determine whether the judgment record was filed before execution issued, unless to prevent actual injustice: is injustice to take out execution and levy it, before such record filed, though the same day; as had it been first filed, the debtor might have paid, &c. 3 Cowen, 19.

§ 2 *con.* *From* may mean *inclusive* or *exclusive* of the day, &c. *From the day of the date excludes the day;* 2 id. 165–168; cited ch. 130, 1, 5, seems different; Cow. 189–192, Doe *v.* Watton, seems to be the same, but all these, and many other cases like them, were before Pugh & Wife, &c.; in this section even lord Mansfield changed his opinion. Art. 5. *Con.* 1 Wils. 176—177, cited ch. 114, a. 19, s. 4.

CHAPTER XXVIII.

DAMAGES.

§ 6. As in the printed work, each statute enacted by the legislature of Massachusetts, is cited by its true date, that is, the common year, month, and day, when enacted, except a few taken from Massachusetts Reports, and some object to this Art. 1. *Con.*

I. Ch. 28. *Art.* 1. *Con.*

course, it may be proper here to state the reasons briefly. In fact, this mode of citing was exactly that prescribed by the legislature, to the time when this work was put to press, with one exception, as below. The legislature in the time of the colony, adopted the common year, and not the royal or political year, and omitted chapters. In the time of the province, the statutes were arranged in *chapters*, in each *political* year, with the royal year at the head of each page. This mode was discontinued when our revolution commenced, and independence was declared. After that, the year of our Lord was put at the head of each page: the political was continued in 1876, 7, 8, and 9, and also chapters. January 22, 1779, then was first added the true date at the end of each statute or act, when it was enacted, and seems then, first to have been discovered the true way of dividing it. In the political year, beginning May 27, 1778, there are two series of chapters; in that of 1779, a new series of chapters each session; so after the constitution was adopted, for instance, May session, 1783, chapters 1 to 15; September session, 1783, chapters 1 to 8; January session, 1784, chapters 1 to 48, omitting 36 and 43. All these series of chapters were in the same political years. Some made in 1784, a new series of chapters for each session; some 1785, and so on; therefore, citing the political year and chapter is to no purpose without also citing the session, as 1st, 2d, 3rd, &c., in that year. This chaptering by sessions continued to the year 1800, then the committee of the legislature, who completed the revision of the laws, arranged them, and caused them to be published, observing this confusion, and that every statute after Jan. 22, 1779, had, at the end of it, the true date of its enactment, that is, the common or christian year, month, and day, omitted chapters altogether, invariably preserving said date. The same principle was adopted in the enactment of statutes from 1800 to 1811, that is, adding said date, and omitting the political year and chapters is in the third and fourth volumes, published 1807 and 1812, so only the true date is cited in the first and second volumes Massachusetts Reports. The first citing of the Commonwealth's statutes in these reports, by political year and chapter, was July term, 1807, page 15, vol. 3, statute, 1783, see 26. We find no such chapter in the regular volumes published by the legislature. In the original pamphlets so published, we find the first session that year 8 chapters; in the 2d session we find chapters 1 to 48, 36 and 43 omitted. In page 408, we find statutes 1802, ch. 135, we find no such statute or chapter printed in any printed volume, but we find in vol. 3 of the statutes published 1807, a statute enacted, and dated March 8, 1803, and in the margin, 135 written with a pen, and it seems to be the same statute, as

it is on the same subject of highways. This mode of citing, antidates three fourths of Massachusetts statutes one year, as one enacted in 1803, before the last Wednesday in May, is cited 1802, as above; hence, one who reads the reports, knows nothing of the true date of the statute, as to near all the statutes of the Commonwealth, for this manner of citing them, is but the lawyer's pen, as above; he makes *one* series of numbers only, for a *whole* political year; whereas, the legislature, most of the time, has made a series of numbers for *each session*. Of course there can be but little agreement, nor is it recollected a statute can he formerly pleaded by the *political* year. The true way of citing *American* statutes, all of which are truly dated, is by *their true dates*, and to be very exact to add the chapter in a parenthesis, as is done in the best American reports. The objection to the true dates alone, is, that there often are several statutes of the same date; but ninetynine times in a hundred, the subject matter named decides which, but this, the only objection to citing by the true date, is obviated by adding thus, (ch. 20. &c.) as above proposed. The statutes enacted in Massachusetts from June 8, 1822 to June 16, 1827, and edited by Metcalf, are noted thus; an act to regulate the storage of gunpowder, [Feb. 21, 1824,] the true date, and in the margin, chap. 149. This is a good way; but this chapter 149 in the margin, is the editor's work only. The true date is added by the governor, when he signs, and that only, and no chapters appear as the acts come from the legislators, and as chapters are added only by printers and editors, they are of no authority, and so of no use in pleading statutes.

Art. 2. *Con.*

§ 9. A legacy was for $150, 'to be paid at the rate of, and in proportion to, likely 6 feet of oxen, at $50 per yoke.' Held, the legatee might recover the value of 3 such yoke of oxen when the legacy became due. The $105 were to be paid in 1, 2, and 3 years, &c., and when the first sum became due, such a pair of oxen being worth $70, the legatee recovered that sum. Against this immense weight of authority in West *v.* Wentworth & Beach, 3 Cowen, 82, 83, the Sup. Court in New York, decided that the measure of damages is the highest price between the pay day fixed on, and the time of the trial. The point does not appear to have been examined; they cited only 1 Bay. 105, and Dutch *v.* Warren; and the court by Sutherland, justice, cited only Cortelyou *v.* Lansing, 2 Caines, Cas. Err. 216; not to the point, for there was no time fixed for redeeming the pledge: next the doubted case, Shepherd *v.* Johnson, 2 East. 211; court cited no authority, but decided against the authorities the council cited; and the same in trover, if no time is agreed by the parties.

2 N. H. Rep. 282.

Morrill *v.* Morrill, 2 Barn. & Cres. 624; 1 Bay's. R. 105-309-238.

I. Ch. 28. *Art.* 2. *Con.*

§ 7. *Mitigation damages.* In *assumpsit* for goods sold and delivered, the deft. may to this end prove they were of a quality inferior to what they were represented to be at the sale. Completely to rescind a contract for goods sold and delivered, they must be *redelivered.* 1 Mason, 437, Miller *v.* Smith.

Art. 4. *Con.*

§ 3 *con.* On motion for *treble* damages, &c., under the act, (Sess. 36, ch. 56, s. 29) the court must be on the statute, confined to it, the jury must find for the plt. generally, and assess the *single* value of the wood, &c., in terms, otherwise the court will intend the jury found *treble* damages, or that the deft. brought himself within the provisos of the act, and Benton *v.* Dale, 1 Cowen. 160 and 176.

Livingston *v.* Platner, 1 Cowen, 175.

1 Cowen, 584—586. Beckman *v.* Chalmers.

Motion for treble damages and treble costs in trespass, *quare clausum fregit*, for cutting and carrying away the plt's timber and wood, on the premises: four counts. Held, 1. to entitle the plt. to such damages, &c., on the act, Sess. 36, ch. 58, s. 29, his declaration need not negative the exception by alleging the trespass was committed *without the leave or permission of* the owner; for the exceptions are confined to trespasses *on lands of the State, or the commons of some city or town:* 2. It is sufficient the jury find the deft. guilty, and assess *single* damages for the plt., without pursuing the very words of the act, '*single value of the timber*,' &c.

Art. 5. *Con.*

§ 3 *con.* Held, in New York, neither surety nor principal is bound beyond the penalty. 3 Cowen, 155–158, Clark *v.* Bush; many cases cited by the court both ways.

7 Wheat. 13—22. Taylor in error *v.* Sandiford & al.

§ 5 *con.* May 13, 1816. T. and S. Sandiford, in writing, engaged to build for Taylor, certain houses for a certain sum, and added, 'the said houses to be completely finished on or before the 24th day of December next, *under a penalty of one thousand dollars in case of failure.*' This sum is to be construed as penalty, and not *liquidated* damages, nor to be set off as such. See Smith *v.* Dickerson, ch. 148, a. 9, s. 8, and cases there; 2 Pothier by Evans, 93–98, Ralfe *v.* Paterson, ch. 101, a. 1, s. 14; cases there cited, and cases this chapter.

5 Cowen, 152—158, Gleason *v.* Pinney.

Assumpsit and error brought, held in an action on a note for a certain sum of money, payable in specific articles at a certain price, the sum of money expressed, is the true measure of damages.

6 Cowen, 599 601.

Three give a joint note; they are all sued; two taken, third not found: one, A, pleaded the general issue to two counts, and demurred generally to two others. Another, B, did not plead, and was defaulted. Trial, and damages assessed against A only. Plt., another term entered judgment by default against B, and noticed the assessment of damages against him before the clerk. No appearance was entered, or common bail filed for him. Held, the inquest was irregular, and set aside with costs, and

the court said, where there is an issue as to one deft. and a default as to another, the damages must be assessed against both defts., by jury at the circuits on a venire *tam quam*. I. Ch. 28. *Art.* 5. *Con.*

§ 21. Chancery relieves as to penalties and forfeitures, where the case admits of certain *compensation*; but not when sums are agreed or covenanted to be paid as *stipulated damages;* but it will not interfere except where the party can, clearly and fully, be indemnified, and can be placed in the same situation he would have been, if nothing had happened. Skinner v. Dayton, on appeal, 17 Johns. R. 357.

§ 22. If a party insist on the payment of stipulated damages as a discharge, he must show they are in *lieu of a performance* of the contract, the payment of which is an alternative for his election. Gray v. Crosby, 18 Johns. R. 219.

§ 1 *con.* In assault and battery, the deft. cannot give in evidence, in mitigation of damages, the *acts*, or declaration of the plt. at a different time; but only facts fairly to be considered as part of the same transaction. The provocation to be in evidence, must be so recent and immediate, as to induce a presumption that the violence done, was committed under the immediate influence of the feelings and passions excited by it. Art. 7. *Con.* Lee v. Woolsey, 19 Johns. R. 329.

§ 5 *con.* The same principle found, that is, two beat A, or convert his goods, and he recovers against one, he is barred as to the other; and the plt. may in trespass, *qu. cl. fr.*, prove consequential damages, as the loss of crop, &c.; by the deft's. driving away the plt's. slaves, &c. 2 Greenl. 46–91–93. 3 Har. & M. H. 510, 511.

§ 4. Entire damages are assessed on several counts; one of them bad; judgment arrested. See Arrest of Judgment, index. 2 N. H. Rep. 398. Art. 8. *Con.*

Trespass *quare domum fregit*. Held, several jointly sued for the same act, the damages must be jointly assessed, though they sever in pleading, or one suffers judgment by default, and the trial proceeds upon *venire tam quam:* 2. Defts. may show in mitigation of damages, their motive to enter the house, as that it was to search for furniture, which they had been informed was missing: 3. The one defaulted is not a witness for the others; *secus* if he plead, and there is no evidence against him. 6 Cowen, 313—316, Bohun v. Taylor & Collins in error.

CHAPTER XXIX.

EXECUTORS AND ADMINISTRATORS.

§ 6 *con.* A *legacy* is not a debt within the said acts of March 9, 1784 and 1817, a. 190, s. 17, which authorizes the grant of an administration *de bonis non*, where there are debts due from the deceased person, unpaid. Art. 1. *Con.* 2 Pick. R 361.

§ 9 *con.* So in Virginia, it seems if one, not the proper per-

I. Ch. 29. *Art.* 1. *Con.*

son be appointed administrator by a competent court, his acts are valid, while he remains administrator: 2 Munf. 479, Royall *v.* Eppes; and 1 Call. 3, 4 Munf. 403: where the personal property of the wife is settled, by deed executed before the marriage, and duly recorded, and she dies intestate, living her husband, and the trustee is to convey the same to her legal heirs, her nearest blood relation is entitled to administration on her estate in preference to her husband. Where a testator leaves his first will in Virginia, and his last in England, and his executor, takes out letters of administration on the one in England, this does not, *ipso facto*, repeal letters of administration granted in Virginia on the first will; but the English executor must first qualify, by giving bond and security as the law directs.

Bray *v.* Dudgeon, 6 Munf. 132.

Burnley's administrators *v.* Duke & al. 1 Rand. 108.

4 Pick. 33–44, Stebbins & al. *v.* Lathrop.

§ 10 *con.* Held, 1. Though the widow dispute the will, yet when proved she is entitled to administration: 2. The judge of probate has power, on the application of one interested in a will, to summon the executor, or any one having it, to exhibit it for probate, as the creditor of the executor and principal devisee may claim to have it proved, &c.

5 Pick. 519—522, Harrington *v.* Brown.

Held, 1. If administration be granted in any county on the estate of a person dying without the state, parol evidence is admissible, to show that he left estate in that county, though such estate be not inventoried; hence the administration is well granted: 2. If an administrator sell land by license of court, and purchase it himself, the sale is not void; and if voidable, it is only by persons interested in the estate, on statute, 1825, ch. 89.

§ 18. It is the duty of an executor or administrator to apply the assets of the estate, not necessary for the payment of debts, to exonerate the real estate of the testator or intestate, which may be under mortgage.

4 Rand. 397—405.

7 Johns. ch. R. 45.

§ 19. If a mortgagor of land in New York, give a power to sell to A, mortgagee in another State, A's executor or administrator may sell, though appointed in the other State, the power being decreed from the mortgagor, and not from a court in another State; and a surviving executor of the mortgagee can sell.

Huling *v.* Fort, 2 Litt. 194.

§ 20. Under the act of Kentucky, of 1811, a suit may be sustained on letters of administration granted in another State, and they need not be drawn out at large in form; a copy of an order of court, stating that letters of administration were granted to the plt., is sufficient. The constitution of Kentucky enables an administrator in Virginia to sue &c. in Kentucky.

3 Litt. 182

§ 21. Administration taken in one State is not in force in another. s. 17, above; 4 Rand, 158--161; 1 N. H. Rep. 193; 2 do. 291: nor can the administrator endorse a note &c.

§ 3 *con.* The first act in Virginia, that required executors to give bond, was enacted in 1711, and related only to *suspected* executors. This act prescribed the form, also, of administrator's bonds, and oaths of executors and administrators, all in the same form, and in the forms of those prescribed by 22d and 23d Ch. II, and extended not to the proceeds of *land* sold in Virginia, as they did not in England. Condition is confined to *goods*, *chattels*, or *credits*, and these only were meant by the word estate. If the executor claim sums of money advanced to him by the testator, as a *gift* and not as a *loan*, this claim will not be allowed on the executor's own oath and slight circumstances. In the same manner was the word *estate*, in the condition of the probate bond in Massachusetts, construed prior to the year 1818.

1 CH. 29. *Art.* 2. *Con.*

2 Rand. 493—494. p. 497, & pp. 507—514.

§ 6 *con.* This bond in Kentucky, is somewhat different. The sureties in administration bonds, are bound for the legal distribution, though declared to be *real* estate. They are not liable for the default of the principal in payments to distributees; though they are not liable unless the administration bond provides for the distribution of the surplus among the heirs, yet the administrator himself is liable to the same extent that he would be if the bond had conformed to the law. See, also, 2 Bibb. 292; 1 Marsh. 488—492.

1 Litt. 99. 1 Litt. 95, Barbour v. Robertson. Baltzell v. Hall, 1 Litt. 100.

§ 2 *con.* There can be no license to sell where executors give bonds to pay debts and legacies, nor is there need of any, for such executors can sell. It is the duty of executors and administrators to plead the act of limitations. The creditor, to levy on the real estate of the deceased, must sue in season. A license to sell, to pay debts or legacies, will not be granted after they are barred by said act; p. 429, may waive the general statute of limitations, not the special one, 1788, ch. 66. See limitations, ch. 161; see p. 432—433; p. 449, an administrator is not liable to account for buildings erected by his intestate on his wife's land.

ART. 3. *Con.* 16 Mass. R. 172—118.

§ 6. Where an administrator may recover a note, his intestate could not. On a promise of *marriage* broken by the promissor, an action lies not against his administrator. The promissor died, pending the action against him. Held, it did not survive. The female promisee alledged no special damage. The court rather viewed it a case of tort, 'where there is a duty, as well as a wrong, an action will survive against the executor.'

1 Pick. R. 71—80.

§ 4. An administrator may occupy his intestate's real estate with the consent of the heirs, accounting for the agreed rent, or as settled on stat. June 22, 1789, (ch. 11.) Any clear mistake in an administrator's account, may be corrected before

ART. 3. *Con.* 1 Pick. R. 157—162.

I. Ch. 29. *Art.* 3. *Con.*

the final settlement of the estate, p. 530. Where the administrator is liable to pay interest, and 1 Jacob & W. 39. If an executor pay to creditors more than the amount of the personal estate, he makes it his own, 64.

Art. 4. *Con.*

§ 3 *con.* The creditor made the debtor his executor, and the court by Sutherland, J. seem to be of opinion the debt was extinguished. He said, p. 807, 'the rule is universal, that when the remedy is suspended by the act of the party, entitled to it, it is destroyed forever.' This may be true, and the *action* may be suspended, but the principle hardly applies to the case of a debtor made executor, for though the *action* is suspended, all remedy is not, for the probate court may hold the executor to account for the debt, as assets in his hands, and to this purpose he may be sued in the probate bond. In this case the general rule is admitted by the court, but the exceptions are much relied on; nor was it a question of assets in the probate court: Rely on Wankford *v.* Wankford; 3 Bac. Abr. 119; Sutherland, J. also, cited to support the general rule, Toll. L. Ex. 272, 8 Co. 136; Bac. Abr. Ex. A. 10; 2 Bl. Com. 512, R. Cow. 184, Wankford *v.* Wankford; 1 Salk. 299; 11 Mass. R. 269; 12, id. 201; Off. Ex. 31. The true principle is stated 12 Mass. R. 199--205; Winship *v.* Bass, &c.; See s. 20, this article. The court in New York, held the executor's debt, he owed the testator, assets towards paying his debts, but not for the benefit of the next of kin or of general legatees, unless it appears on the whole will, the testator means not to discharge the debt; then the executor is trustee for them, to the amount of his debt.

2 Cowen, 781-810, Marvin *v.* Stone.

Sutherland, J. cited Thomas *v.* Thompson, adm'x. 2 Johns. R. 471-477.

§ 19 *con.* If the authority be given to them *virtute officii*, so an acting executor, where the other renounces by 21. H. 8, ch. 4, Smith's lessee, *v.* Folwell; 1 Binn. 546; Jackson *v.* Ferris, 15 Johns. R. 348; Nelson *v.* Carrington, 4 Munf. 332; Miller *v.* White, Tay. R. 309: *Secus*, if a naked power, Woodbridge's heir *v.* Watkings, 3 Bibb's Rep. 349. And where a testator devises land to be sold, and names no one to sell, the executor must sell, wherever the purchase money is to be applied to the payment of debts, or be distributed as legacies. Sugden on Powers, 167--173.

4 Har & M'H. 485-487; 1 Hop. Ch. R. 515-529, Rogers & al. *v.* Rogers & al.

Two executors, empowered by will to sell lands after letters, &c., granted, one relinquishes the trust, the other may sell. If A be indebted to B, and A makes B his executor, and B gets judgment against A in his lifetime, and after A's death sells his lands on B's execution, and *B himself* purchases, his purchase is vacated; he can no more purchase than any other trustee can, who sells. An executor, administrator, or any other acting in trust, can in no case buy when he sells. As the

seller of another's property he holds in trust, it is his duty to get the best price, but as buyer, his interest is to reduce the price. I. Ch. 29. *Art.* 4. *Con.*

The testator directed his estate to be sold, &c. after his wife's death, and appointed A and B, two strangers, and his son J, executors to execute his will. A and B alone proved the will; the widow and J and other children being dead, A and B sold the real estate. Held, 1. The testator's objects being in a measure defeated by the deaths, &c. the power itself failed, so the sale was void as far as the vendee's title depended on it, and so far the estate descended to the heirs at law: 2. Where a testator directs his executors to sell land, it seems this is a naked authority not coupled with an interest. There is no estate vested in the executor, as such; and on the death of one them, the power does not survive at common law: 3. It seems 1 R. L. 366, s. 11, only provides for the case of an executor who refuses to act: 4. In case of several executors having a naked power, and one dies, it ceases, though he never qualified as executor. Bergen *v.* Bennet, 1 Cains. Cases in Err. 16; 6 Johns. R. 73--81; Jackson *v.* Jansen, testator's object ceased; 16 Johns. R. 167, Jackson *v.* Given, id.; as to the power cited, 2 Johns. ch. R. 20; 14 Johns. R. 527, S. C.; on appeal, id. 553, same case, Osgood *v.* Franklin; Jackson *v.* Ferriss, 15 Johns, 346; other cases in Johnson; Gebach *v.* Smith, 3 Binn. R. 69; Pow. on Devises, 291-310; 3 Salk, 277; Co. L. 113, a.; id. 181, c.; id. 236; ard. 415; Toll. L. E. 171--2—3, 304. Sharpsteen in Error *v.* Tellou, 3 Cowen, 651-662.

H § 2 As to an executor of his own wrong. 2 N. H. Rep. 475, &c., Neal *v.* Baker, executor, and Clements *v.* Swain. Where the estate is insolvent, and he voluntarily pays some creditors double the amount of debts received, he is still liable, and though he takes out letters of administration after he is sued. Art. 6. *Con.*

§ 11. *Misuse of testator's property.* An executor commits a fraud, when he applies or pledges to his own use, the property of his testator, when not in advance to the estate, and the purchaser or mortgagee, with notice thereof at the time of the purchase, &c., will be decreed to make restitution; but if no such notice, he will be protected as a purchaser, &c. without notice. The executor gave a deed of trust, of slaves and goods, to secure an old debt of his own. This principle asserted, the executor holds the legal title of the testator's effects, in trust for creditors, and legatees, specific, pecuniary, or residuary, and if there be fraud and notice as above, they, and also the administrator *de bonis non*, may question the sale or mortgage, cited 4 D. & E. 621; 11 Ves. Jr. 421, 2 Rand. 294—303.

1. Ch. 29. Art. 6. Con.

Plowden, 525; 5 Ves. Jr. 211--212; 7 Ves. 152; 14 Ves. 352; Livermore, 129--130; 3 Munf. 7; 17 Ves. 153; well observed the *purchaser* can have no temptation to pay his money for questionable title. The same as to the mortgagee who lends his money at the time of the pledge given.

2 Rand. 488--507, Jones v. Hobson.

§ 12. *Sureties of executors how far held.* 1. Not held for proceeds of land sold by the executor under the will: 2. Not for the acts of his executor in the administration of the assets of the first testator: 3. Executor and sureties are sued, and he confesses assets &c., court of equity may decree immediately against him, and leave the creditor to proceed against the sureties by *motion*, if it should become necessary. And where the administrator so comes in and fails to support the action, costs are taxed against the estate of the intestate. 2 Pick. R. 68, Brooks, &c. administrators, *v.* Stevens in error. See 16 Mass. R. 530.

Art. 7. Con.

2 Greenl. 109--113, Sturgis v. Reed, administrator.

§ 9. *And in cases of insolvency.* The intestate is sued, and dies pending the action; his administrator assumes the defence, and omits to suggest the insolvency *on record*, or pray a stay of execution; hence it is issued and returned *nulla bona*; it is waste, and the administrator is liable to a judgment and execution *de bonis propriis*. After an execution has been regularly issued and returned, it cannot be set aside. Not enough the administrator's attorney mentioned the insolvency *verbally* to the court, when he should have taken the proper course on *record*. 2 N. H. Rep. 36.

Ross v. Luther, Sheriff, 4 Cowen, 158-163.

§ 10. Debt for an escape of Wait, a prisoner, on *ca. sa.* from gaol limits. Held, 1. The issuing of the writ is the commencement of the suit: 2. This seems to mean the actual delivery of the writ to the officer: 3. A mistake of the name of the attesting chief justice, is amendable: 4. When this is in a *ca. sa.* the sheriff cannot object in an action for an escape. See 17 Johns. 63; 18 id. 14, 496; 19 id. 170; 1 Cowen, 47. But 18 Johns 14, 496, it is stated if a writ be made out, and put in the mail, and actually sent off for the officer's, with a *fixed* intention to have it served, *such act and intent*, that puts it on its way from the plt. to the officer, is the commencement of the suit; while the plt. keeps it in his hands his intentions are unknown. The delivery of the writ to the coroner's wife is the commencement of the action against the sheriff. By these cases it appears two things are essential to the commencement of the suit. After the writ is made out: 1. The plt. must be absolutely determined to have it served: 2. It must be put on its way to be served: 3. The plt. put it into the hands of A to deliver it, when he finds a certain event shall happen, as the prisoner passing over the gaol limits. A finds the fact exists

Bronson v. East, 17 John. 63.

and *absolutely* determines to have it served. This decision is the commencement of the action, if he have power to decide to commence; but if he have not this power his decision has no effect, and the suit is not commenced till he actually delivers it to the proper officer to have it served. I. Ch. 29. *Art.* 7. *Con.*

§ 11. Mass. Act, March 2, 1829, provides that all actions for injuries done to *real* estate, that abate by the death of the parties, be considered as surviving to the executor or administrator, and prosecuted or defended accordingly, as the deceased might have done, &c. if living—may appear on motion, &c. notified, &c. and nonsuited and defaulted. &c. Judgment *de bonis testatoris*, assets, &c.

§ 10 *con.* Where the executor or administator buys lands, &c. of the heirs, there is a trust, and he must act accordingly, as if an administrator purchase lands from the heirs of his intestate sold under a license, they being of age or not, his purchase is valid if fair, and for a full price. But if he gives an insufficient price, he may be made to account for the deficiency. The same principle applies to guardians and wards. 2 N. H. Rep. 218, 223. Lovell *v.* Briggs and another, and sundry cases cited. Art. 8. *Con.*

§ 11 *con.* Nor on the former law, is he held by his general administration bond to account for the *real* estate, or to sell it or for the proceeds if sold, but is on the statute of 1817 c. 190: 2. Does not refuse to account, till cited by the judge: 3. If no special bond be taken on license to sell real estate, the remedy is by removal of the administrator. Mass. Statute 1783 c. 36; Maine Stat. c. 51. § 7; 1 Greenl. 139, 147, Nelson Judge, &c. *v.* Jacques & al.

§ 17 *con.* Held, two judges against one, that an administrator *de bonis non*, may maintain an action of debt on a judgment obtained by the executor: 2. Enough to allege that A, executor of B, recovered the judgment, and it will be inferred the debt was originally due to the testator on the plea *nul tiel record*. Judge Coulter held the judgment recovered by the executor was a valid one, and a bar to any action on the original contract. 3 Rand. 287—316 Dykes *v.* Woodhouses' adm'r. 1 Saund. 92 b. 5 Co. 9—6 Co. 45. Cro. Jam. 4.

§ 20. Debt on administration bond; also on bond as to selling real estate, by license of court, on the first to charge the administrator for money received, not accounted for, it must appear he received it, before he settled his administration account, or if after, then that he has been cited by the judge to render an account. He is not held to state the conditions of the sale in an advertisement for the sale of land, &c.: 3. He may make immediate payment, a condition of such sale: 4. The replication must state when the money was received; the time was stated under a *videlicet* and bad. See *Videlicet*, ch. 192 a. 9. 16 Mass. R. 129, 134, Paine, Judge, *v.* Fox.

§ 21. Where the administrator dies and his account is not settled, it does not belong to the administrator *de bonis non*, to present it to the judge, and settle it, but to the representative 2 Greenl. 75—81.

1. CH. 29 *Art.* 8. *Con.*

of the deceased administrator. An administrator on an estate, acts in *auter droit* in his transactions with the *debtors and creditors* of it, but in settling *his own* account with the judge, he acts in *his own* right; this right and duty passes to *his* executor or administrator, and if necessary to sue the bond of the deceased administrator, his executor or administrator must be sued, and not the administrator *de bonis non*; his duties are limited to the estate *not* administered upon. See Toller, 492.

ART. 16. *Con.*

§ 1 *con. Pleadings and evidence.* Only case of simple contract on which debt does not lie against the administrator, is where the intestate could wage his law. 8 Wheat. 672, &c. not in cases of notes and bills, &c. Com. D. Adm. B. 14; Pleader, 2 W. 45, tit. 2 D. 2; 1 Chitty's Plead. 106; Chitty on bills 426; 2 Saund. R. 74, note 2 by Wms; Norwood *v.* Reed, Plowd. 182; Cro. El. 557. Wager of law is excluded in the U. States by the constitution of the U. States, &c. in which it is declared, 'that in all suits, at common law, where the value in controversy exceeds $20, the right of trial by jury shall be preserved.

1 Nott & Mc Cord, 77, 78.

The executor of an executor represents the first testator, and when an action is brought against the executor of an executor for a debt owed by the testator, he may be declared against as executor of the first testator, without noticing the first executor, but it is the most correct to notice him; was debt on a judgment.

Osgood *v.* Manhattan Co. 3 Cowen, 613, 23.

Error from the supreme court to the court of errors. *Assumpsit* by said Company, on notes against Walter, Franklin, Osgood, and others, heirs and devisees of Maria Osgood; the main question was, if her deeds of real estates to her daughters were *fraudulent*, as to the plts. and other creditors. Her executors petitioned the surrogate for license to sell her real estate to pay debts; their petition was accompanied with a sworn account of the personal estate; this the supreme court admitted to prove her insolvency, but the court of errors *contra*, and held the acts or admissions of executors are not evidence against the heirs or devisees: nor to show the insolvency of their ancestor, (their mother,) when she conveyed the real estate in question to certain persons, in an action by a creditor against her heirs and devisees, seeking to show that such conveyances were *voluntary* and *fraudulent*, whereby the subjects of them become assets in the deft's. hands, and 1 Munf. 437.

3 Greenl. 174, 177.

An administrator has trespass for an injury to personal property, committed after the intestate's death, and before administration granted, and if described in the writ as the intestate's property, and not saying of the administrator, it is well after verdict.

3 Greenl. 250-256, Carlisle *v.* Burley.

The executor may sue *in his own right*, on a contract made, or for a tort committed, *after* the testator's death: 2. In trover the property is not changed *till judgment*.

2 N. H. Rep. 71 An administrator has an action to foreclose a mortgage made to the intestate. 1. Ch. 29. Art. 16. Con.

§ 2 *con.* An administrator recovers judgment, he may bring debt on it in his own name and need not declare as administrator. 16 Mass. R. 71–73.

§ 3 *con.* If two administrators sue, and one a *feme sole* and pending the action, she marries, it does not abate the action; the other proceeds alone. 17 Mass. R. 341, stat. Feb. 6, 1784, s. 19 (c. 24)—this is Mass. statute law.

If the deft. be sued as executor when he is administrator; or if the suit be commenced within a year from her appointment, it can be pleaded only in abatement. 2 N. H. Rep. 475.

§ 10 *con.* If an executor bring an action on a promise to the testator, barred by the act of limitation, and there has been a promise, by the deft. to the executor, he must declare on it. In this case it may be understood that the executor or admininistrator may renew the debtor's promise to the executor or administrator of the creditor, that was made to him, and on this renewal the plt. executor may specially declare and take the case out of the statute of limitations, otherwise barred by it; but the plt. executor cannot so release, as to be a witness to prove the renewal, as his liability to costs will continue. See Ch. 39 a. 5. s. 14; 3 Greenl. 17–21. 2 Har. & Mc. H. 152, 153.

But an administrator cannot revive a debt due to himself from the intestate, barred when he died, by said acts. 2 Pick. R. 567, Richmond administrator petitioner. 2 N. H. Rep. 215.

An administrator may plead never promised within 6 years; and if any fact brings the case within the statute, it must be replied. A promissory note is *bona notabilia*, where the debtor lives. p. 292, Thompson v. Wilson.

§ 17 *con.* If an administrator have assets to pay a debt, and suffers it to be unpaid, and in consequence of his neglect it is sued for and recovered with interest and costs, he cannot charge such interest and costs to the estate; and if he ship the intestate's effects on a trading voyage, he is liable for any loss that may arise out of the transaction. Callaghan v. Hall, 1 Serg. & R. 241. pp. 364, 356.

§ 19 *con.* Under the plea of *plene administravit*, the existence of debts of a superior nature cannot be given in evidence, they must be specially pleaded. The administrator sues a bond to the intestate—plea *non est factum;* plt. need not produce his letters of administration.

§ 27 *con.* Same, 15 Mass. R. 374. Sullivan administrator, *v.* Holker and Porter, promises to a former administrator.

§ 34. Where an executor or administrator pleads a false plea, the judgment is *de bonis testatoris* and *non de bonis propriis*, &c. and under the statute, if sufficient goods and chattels cannot be found, then of lands and tenements, &c. If one of several executors or administrators admits a debt of the deceased to be due Lansing v. Lansing, 18 Johns R. 502; 16 do. 276.

I. Ch. 29. Art. 16. Con.

this does not conclude the others, but they may show it is paid. James *v.* Hacklay.

§ 35. A, one of three executors owed the testator a debt by simple contract, when the will was made. He refused to act, and the other two proved the will and administered. A afterwards gave a bond to the two acting executors for his said debt; and above a year after assumed the office of executor, and cancelled the bond. Held, it was given for a valuable consideration, and to the obligees in their *private* capacities, the addition of executors, &c. being merely words of description, and that A's act of cancelling the bond was a void act; the two executors recovered.

Gardner *v.* Miller, 19 Johns R. 188.

Osterhout *v.* Hardenburgh, 19 Johns R. 266.

§ 36. *Assumpsit* against an administrator; deft. pleaded *non assumpsit—non assumpsit infra sex annos* and *plene administravit.* Verdict for the plt. on the two first pleas, and judgment of assets, *quando acciderint*, &c. Verdict for the deft. on the third plea, and judgment for him for his costs.

Troup *v.* the Executors of Smith, 20 Johns R. 33.

§ 37. Though an action does not lie by an executor or administrator for the *fraud* of the testator or intestate, that does not benefit *the assets;* yet it lies against his representatives on a contract fraudulently performed by him.

§ 38. Debt on administration bond in two actions: the People *v.* Mc Donald and Dobbs impleaded with Sarah Haviland; same *v.* same, 1 Cowen, 189—193: 1. Record amended where by mistake the judgment was *de bonis propriis*, where it should have been *de bonis testatoris si, &c. et de bonis propriis si non, &c.* Actions were under statute 1 R. L. 447. to recover two several claims in favor of the same plt.: 2. Court ordered them to be consolidated: 3. Assigning for breach not filing an inventory, &c. within six months where not shown the relator suffered any injury from the omission, is improper: 4. This assignment ordered to be stricken out of the declaration: 5. The relator being within the jurisdiction of the court, no stay of proceedings till costs be secured: 6. They may be enforced by attachment. See ch. 149. a. 2. s. 44: 7. The plt. had leave to declare *de novo.*

Art. 19. Con.

§ 10. *Executor's compensation* in New York. The statute of 1817, authorizes the court to make an allowance to the executor, in certain proportion, but not any special allowances: 2. There is no fixed rate for an agent: 3. One appointed by the executor is entitled to a compensation for his services, whether the will authorize his appointment or not, and it must be borne by the testator's estate: 4. The object of the act is to give one reward for all services, and that may be ascertained by computation on one species of service only, that is, on receiving and paying money.

1 Hop. Ch. R. 28—47, Mc Whorter, &c. *v.* Benson.

§ 11. *Probate powers in New York, now and formerly.* The probate and prerogative courts of the colony were formed on the model of the ecclesiastical courts of England, as to the subjects of their jurisdiction, but it does not appear they were bound to follow the practice of those courts. Since the Revolution the probate courts in New York have been established and regulated by statutes, the last enacted March 31, 1823; but in this State, as in the others, statutes are often revised and altered. The question in this case was as to the testator's sanity.

I. Ch. 29. *Art.* 19. *Con.*

1 Hop. Ch. R. 408—415, Vanderkeyden *v.* Raid.

Ketchum ex'r. *v* Ketchum, 4 Cowen, 87–91.

§ 12. The plt. declared on a note and for money lent in the lifetime of the testator and a promise to himself *as executor*, after the testator's death. Being nonsuited on the trial, held, 1. He paid no costs: 2. The same as to an *insimul computasset* with him touching accounts of the testator. 3. General rule is, if the executor sue *as executor* when he can sue in his own name and fails, he pays costs; otherwise, if he *must* sue *as executor*. 4. If the cause of action accrue *wholly* after the testator's death, and the executor fails, he pays costs, as in trover on *his own possession*, or *assumpsit* for money had and received to his use, or debt for an escape on his own judgment and execution, *as executor*. But 5. If the cause of action accrues wholly or partially in the testator's life time, as in *assumpsit* on a promise to the testator; so if this be followed with a promise to the executor to pay the same debt; in both cases he *must* sue *as executor:* so of debt for an escape from the testator's judgment and execution, though the escape be after his death. In these cases, suing necessarily as *executor*, if he fails he pays no costs. For costs, cited 10 East, 293; 2 Strange, 1006; 11 Johns. 400; 16 id. 148; 17 id. 268, Hogeboom *v.* Clark; 1 Wash. 138, Thornton, ex'r. *v.* Jelt. These, on the ground he might have sued in his own name, against costs, 2 Bos. & P. 253; 3 Burr. 1586; 10 East, 293; Cro. J. 229; 1 Bos. & P. 445; 11 Johns. 403.

On the true principle above stated, and 5 D. & E. 234, see ch. 9. a. 19. s. 9, where near all the distinctions are taken and cases cited, showing how executors and administrators must sue in *auter droit*, or not; and 4 Cowen, 550–552, and many cases cited.

CHAPTER XXX.

FACTORS.

Art. 1. *Con.*

§ 3. *con.* If a general shipment be made to a factor to secure to him his advances and other just charges, he has a

I. Ch. 30. *Art.* 1. *Con.*

lien therefor only on that, and subject to such lien the owner may dispose of the property as he pleases. 3 Mason, 334–341.

1 Nott & Mc Cord, 517–527, Barksdale v. Turner.

If the principal instruct the factor to sell produce for cash only, and he allows the buyer to take it away without paying the money at the time of the sale, who absconds immediately, the factor is liable for the amount, though a usage is proved among the factors of allowing to purchasers seven or fourteen days to pay, where the sale has been for cash, for no usage will authorise a departure from positive instructions of the principal: they are the agent's law. This usage had existed in Charleston forty years. Mr Justice Cheeves, contra.

4 Barn. & Cres. 547.

§ 9. How a factor may sell to pay his own debt. The plt., the principal, brought *assumpsit* for the goods sold and delivered. Plea, 1. General issue: 2. In bar for said goods, &c. were with the plt's. consent so sold and delivered to the deft. by John Summers, agent and factor of the plt., and in Summers' own name, as the true and sole owner of them, and the deft. did not know the goods were the plt's. nor did he appear; that when said goods were sold and delivered Summers was indebted to the deft., and still is, in more than the value of the goods, and that the deft. is ready and willing to set off and allow the plt. the value of the goods out of the monies so due and owing from the said Summers. Held, on special demurrer that the plea was good. One objection to the special plea was, that it amounted to the general issue: another, the debts not of a kind to be set off. As to the first objection, cited George *v.* Clagett, a. 8. s. 5; Rabone *v.* Williams, 7 D. & E. 360, n.; Boot *v.* Wilson, 8 East, 311. Off-set, same and other cases, as Baring *v.* Corrie, 2 B. & A. 137. As to the general issue, see ch. 178. a. 5, &c. Lien, 5 Binn. 441—538.

Leverick v. Meigs and Reed, 1 Cowen, 645–670.

§ 10. *Assumpsit* to recover the amount of two several bills of exchange, each drawn by Rea & Butler, in Savannah, on Tho. C. Butler, of New York, at sixty days sight, both payable to the plt., remitted to him by the deft. for the proceeds of goods consigned to them by the plt. for sale on his account, which they sold at a credit, as his factors, under a commission to guaranty the sales. The drawee was one of the drawers: they failed: facts stated. In this case many points were decided, as 1. A factor, under a general power, will not be responsible for losses, if he acts to the best of his abilities, without breach of orders, gross negligence, or fraud. If there be a loss by his giving credit, on a sale or making remittance, he is responsible, unless it appears he used ordinary diligence to ascertain the discredit or insolvency of him who occasions the loss by his failure: 2. When directed to remit he need not in general inquire into the credit of the drawee: 3. If circum-

stances of suspicion appear against the drawers sufficient to put a man of ordinary prudence on his guard, he will be accountable: 4. If the bill be drawn by partners, he must show the good credit of each, and all of them: 5. A factor need not obey instructions to remit, unless good bills can be obtained, and he must follow literally limited powers: 6. When directed to draw on a good house, he must, at his peril, see the drawee is in good credit: 7. A *del credere* commission is where a factor for a premium (one and one-fourth in this case) beyond his usual commission for sale, becomes bound to pay the price in all events: 8. As to the actual vendee, the factor is the sole owner of the goods and may set off: 9. The guarantee makes the only difference there is between the common factor and one *del credere:* 10. A factor is not bound to pay till payment is due: 11. The guaranty of the sale does not imply a guaranty of the remittance. The factor *del credere* retains his ordinary charactor as to the remittance: 12. The guaranty of remittance depends on the general principle that a note or bill does not pay a prior debt, unless it prove good: 13. The owner, before payment, may resort to the actual vendee, as the collateral security of the factor, and may stop the payment to the factor. Here is a summary of most of the principal duties and powers of both kind of factors. Judgment for the plt. for the amount of the bills. I. Ch. 30. *Art.* 1. *Con.*

§ 2. A factor may sue for goods sold by him, and payment to him is valid if not forbidden by the principal. Gerard *v.* Taggart, 5 Serg. & R. 27, 29. Art. 3. *Con.*

§ 3. *How merchants may make themselves factors and liable,* &c.: as where the plt. a merchant in New York consigned goods to the master of a vessel bound to the Havana for sale; the master, when he arrived there, delivered the goods to the defts., there commission merchants, for sale. Held, as he had no power to pledge them for his own account, the defts. by receiving them, knowing they were the goods, became substituted, as factors and agents, in the master's place, and accountable for the proceeds of the goods to the plt., and could not retain them for any advances made by them to the master, or for the balance of account arising from transactions between him and them. Buckley *v.* Packard, 20 Johns. R. 421.

Same principle, 1 Mason, 440; and if he do, the principal, after demand and refusal, may maintain trover against the pawnee; and he has, by the general law, the *personal* security of the owner as well as a lien on the goods, for his advances; but by contract he may waive his right to personal responsibility. 1 Mason, 9, Peisch *v.* Dickson, and 1 Mc Cord, 1. Art. 7. *Con.* id.

I. Ch. 30. Art. 8. Con.

He cannot pledge his principal's goods. 3 Barn. & Cres. 342.

§ 1 *con.* Same principle, 3 Mason, 232–242, Thompson *v.* Perkins & al.: the factor had a *del credere* commission. See a. 11. s. 4; a. 8. s. 5. The principal recovered: many cases cited. The court stated the true and general principle, that is, 'the principal is entitled to recover wherever he can trace his own property and distinguish it, or its proceeds, from the mass of the property of the factor;' as if sold and notes taken and these can be specifically ascertained. Denston *v.* Perkins and another, 2 Pick. 86, and 5 Pick. 7–10, the same principle; and even if my factor sell my goods to A on credit, and in his books charges A the price, and my factor fail and assign to trustees, and I join in the assignment as a creditor, and the trustees receive A's debt, I can recover the amount of them if I can trace my goods, my factor's book charges of goods sold to A, and his payment therefor to the trustees.

Art. 9. Con.

§ 12. *Assumpsit* for monies advanced by a factor or commission merchant, in New York, for account of his principal, in Virginia. Held, the payment of a balance of account by the factor to his principal after the sales made, and for the purpose of closing the accounts between them, was an assumption of the outstanding debts; and therefore the principal was no longer accountable or bound to refund advances, though the debtors finally failed to pay for the goods sold by the factor the proceeds whereof were looked to for reimbursement; and 1 Pick. 343, 344; 3 Johns. Ch. R. 600, Consequa *v.* Fanning; Simpson *v.* Swan, 3 Campb. R. 291. But to hold the factor, as in the case of Oakley *v.* Crenshaw, a clear intention must appear to assume the debt by the factor.

4 Cowen, 250–253, Oakley *v.* Crenshaw.

5 Cowen, 473, 475.

Bell and others *v.* Palmer & al. 6 Cowen, 129, 135.

§ 13. A factor, or consignee, advancing on the goods his principal consigns to their value or more, is yet bound to obey his instructions as to the time of sale, though there be no agreement to that effect; and if instructed to sell immediately, and he refuses the first offer, expecting a better price, then sells for less than the offer, he is liable, though he act in perfect good faith. The principals were liable for the monies advanced by the factors, and still had a right to direct the sales. Sundry cases cited.

Corlier & al. *v.* Cumming, 6 Cowen, 181, 188.

§ 14. *Assumpsit.* The plts. being factors in Philadelphia, the deft. left with them in the fall of 1820, &c. a quantity of cheese to sell on commission. December, 1820, the plts. advanced to the deft. $900 on the cheese. In March, 1821, the plts. sold of this cheese, and also of the cheese of one Brown, to one Kellogg, on ninety days credit, and took his note for all payable to himself. Held, 1. This did not *per se* make the factors liable to their principals: 2. The note did not

extinguish the demand for the goods, but left each principal to his usual remedy: 3. Nor did the factors by changing this note for two others drawn by one Dickson, and endorsed by Kellogg for part of the sum due to Cumming, and Kellogg's sole note for the residue, make themselves liable, for they still retained the vendee's name: 4. A factor's advancing money and having goods in his hands, is not confined to the goods for his remedy; but he gives a joint credit to the goods and to the person of his principal; but he must first resort to the goods, if they can be made available: on them he has a lien. Factors sued to recover back the monies they advanced. Verdict was for Cumming the deft., on the ground the plts. took one note for the cheese of two distinct owners, so improperly blended his property with that of another. The court thought otherwise, and granted a new trial. The counsel cited numerous cases: the court only 1 Gall. 360; Cowp. 255; 5 Johns. 68; 7 Mass. R. 36. I. Ch. 30. *Art.* 9. *Con.*

§ 4 *con.* A consigns goods to B, his factor, to sell generally. He sells on credit to a merchant in good credit, and takes a note to himself; before payable the merchant fails, the loss is the principal's. 2. If A draw on B before the goods be sold, and B, to raise money to meet A's bills, sells his goods on credit to C, and takes his note payable to B; this he endorses and sells for money, and C fails before the note is payable; B, the factor, pays the endorsee. B may recover against A his principal. The factor had power to sell '*as he thought proper*,' and to '*use his own judgment*,' and as he exercised it fairly, his sale was authorised by the principal and so bound him. *Art.* 11. *Con.* 1 Greenl 172, 182, Greely v. Bartlett.

§ 16. *The liability of factors and consignees, &c. to their principals.* *Assumpsit* on a promise to account for sundry goods, sent by the plt. a merchant of Boston, to the defts. commission merchants in Philadelphia, to be sold on the plts. account. One of the partners died, and a question of accountability arose; the survivor sent on an account, showing a small balance due to the plt. who sued for it before he made any demand; and the question was if his right of action had accrued; he argued it had. The deft. said the relation of the parties was not that of debtor and creditor, but that of principal and agent, and the debtors have been ready to pay the balance when called upon. The court seemed to be of opinion, if the plt. gave no special orders, and they were guilty of no fault, but sold the goods and rendered an account in due season, that their contract was to account, and they ought not to be held to remit the balance at their risk, and they cannot remit at the plts. risk, but in compliance with his instructions, and in this case the defts. wrote they held the balance subject to the plts. order—cause referred back to the referees. See also 17 Mass. R. 103–109. 17 Mass. R. 145, 153, Clark v. Moody & al.

I. Ch. 30. Art. 11. Con.

Other cases belonging to sect. 9, 10 and 11, this article to wit, 3 Johns. Ch. R. 67; 6 Taunt. 110–295; 1 Dow. 274; 2 Campb. 545; 4 id. 171.

5 Pick. 389, Hemenway v. Hemenway.

§ 17. The plt. employed the deft. to sell lands; he sold and took a promissory note for part of the pay, when he might have received the money. When required to pay over the proceeds, said he knew nothing of the matter. Held, the jury might find he unreasonably delayed to pay them over, though the action was commenced before he had collected the note.

CHAPTER XXXI.

FEES.

1 Pick. R. 33, 37.

§ 5 *con.* Held, the statutes of Massachusetts 1817 c. 131, and 1818 c. 118, denying the benefit of law to physicians, to recover their fees, when not duly licensed, extends to those residing out of the State, as to their services rendered within it.

1 N. H. Rep. 28, 29. Eastman v. the Coos Bank.

§ 33. The plt. in an action is liable to the sheriff for the service of the writ. He may recover for the storage of property taken on mesne process, and interest may be taxed on money paid and expended for the purpose; but he cannot recover an extra charge for making the return on the writ—was *assumpsit* by a deputy sheriff employed by one Crane, agent of the Bank, and 4 Binney, 170.

CHAPTER XXXII.

FRAUD.

Art 1. Con.

§ 2, 3 and 4 *con.* But in equity, if a person by fraud, be prevented doing an act, it is considered as if done. 1 Jacob and W. 94; 4 Harris and McHenry, 398.

3 Rich. 205–207, Smith v. Lane & al.

§ 9 *con.* A conveyed his life estate in his wife's land to her father, who afterwards being insolvent, conveyed it to the wife to prevent his creditors taking it; one of them levied on the land. Held, parol evidence was not admissible to prove the father held in trust for the wife, so his conveyance to her was fraudulent. The wife gave her father her note for $20, and knew he was embarrassed. She remained in possession till the extent of the execution, and after the deed to her.

2 Rand. 334, 400.

A voluntary conveyance of property to children, when the donor is largely in debt, is void against creditors in equity, who have established their demands at law or want of property to pay their debts, by some regular evidence.

1 Greenl. 298–302.

A *fraudulent* purchaser of A's goods has no right to object to the officer's proceedings, who seizes and sells them on an execution against A, though those proceedings be irregular.

§ 16 *con.* Dryer, the tenant of a tavern and farm, owned by Hopkins, the landlord, being justly indebted to him for rent, he gave him a mortgage of a mare, horned cattle, hogs, hay and household furniture then on the place and necessary for the usual management of it. This mortgage was publicly given and known, when persons applied to Dryer, the tenant, to buy the mare, &c., he told them she was Hopkins's. And Bissell, knowing the true state of the case, and being a creditor, got judgment against Dryer and execution, and thereon the officer sold the mare and Bissell bought her. Trover for her was brought by Hopkins against Bissell; special verdict and judgment below for Hopkins. Bissell brought his writ of error, and judgment was affirmed. Held, 1. The possession of goods remaining in the vendor after the sale, is not conclusive, but only *prima facie* evidence of fraud as to creditors, and may be explained: 2. It is a sufficient explanation, the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor was in pursuance of some agreement not inconsistent with honesty in the transaction; as where a tenant sells oxen to his landlord in payment of rent upon an agreement the tenant retain them to work the farm, so where Dryer mortgaged the mare, &c. as above. Pages 189 to 206 are numerous cases cited in the reporter's notes.

Bissell v. Hopkins, in error, 3 Cowen, 166, 206.

§ 17 *con.* Replevin for a vessel: plea property in one Long, and not in the plt. and issue. Long owned the vessel, and Oct. 27, 1819, gave a bill of sale of her to the plt. but made no formal delivery; the plt. at the same time, gave to Long a *memorandum* in writing, acknowledging the receipt of the bill of sale, as security for the payment of $2699 14 cts, for which he held Long's note, and agreeing to give up the bill of sale on the payment of that sum, and interest. About June 10, 1820, the plt. demanded pay of the note, and Long being unable to pay, the plt. took possession of the vessel. July 3, one Donnels caused her to be attached by the deft., deputy sheriff, as the property of Long: the plt. brought replevin, and afterwards sold the vessel for $1000, judgment for the plt. Held, 2. There was no usury, though the plt. took 2 1-2 per cent. commission for selling the vessel, and though not sold. The jury having found the commission was not taken as a cover for usury: 3. Taking the interest at the time of the loan is not conclusive evidence of usury. Numerous cases were cited, near all cited in this work, and many of them in this chapter, so need not here be repeated.

1 Pick. R. 288-297, Bartlett v. Williams.

If A mortgage his machines in a manufactory to B, and afterwards, remain in possession, this is only *prima facie* evidence of fraud, which may be rebutted by evidence, showing the transaction was a fair one. About 40 cases cited pro and con; judg-

2 Pick. R. 607, Homer & al. v. Crane.

I. Ch. 32. Art. 1. Con. ment for the mortgagee. Held, there is a difference between a mortgage and a pledge; to this the title is solely on possession. Same principle, 3 Cowen, 166 to 206.

§ 23 *con.* A creditor to secure his debt, takes a conveyance from his debtor, but at the same time, inserts a provision in the deed, to delay, hinder, or defraud other creditors, such a deed is within the statute of frauds, and void: 2. So the deed will be void if the creditor, meaning only to secure his own debt, be privy to the fraudulent intentions of the debtor, thereby *to delay, hinder*, or *defraud* his other creditors: 3. By the Virginia and English statutes of frauds, to vitiate a conveyance there must be a fraudulent intention in the grantor, and notice of those intentions to the grantee: 4. The maxim that a party to have equity must do it, is confined to the parties in the case, and does not extend to third persons. See Boyd and Dunlop, 1 Johns. Ch. R. 478; but Sands *v.* Codwise, ch. 18, a. 3, s. 29, Herne *v.* Moeres, 1 Vern. 465, ch. 86, a. 3, s. 15, 3 vol. Barwell *v.* Ward, 1 Atk. 260; 2 N. H. Rep. 13.

4 Rand. 282—317, Garland *v.* Rives.

§ 34 *con.* In all these cases, and the numerous cases therein cited, we see the nature of fraud, and the regard paid to the intentions of the parties. 1 Randolph, 113, 2 Anstr. 381, 15 Johns. 571; 14 id. 458; 20 id. 442.

4 Rand. 553—568.

§ 36. *How no fraud to favor one endorser.* It is no fraud if the holder of a bill of exchange, agree with one of the endorsers, as A, to throw all the burden on the other endorsers, and that A be liable only in case they be unable to pay. An agreement on the part of the vendee of a chattel, left in the vendor's possession to conceal the purchase, is not *itself* a fraud on creditors, but a matter of evidence, capable of explanation.

4 Pick. 104, 105, Gould *v.* Ward.

§ 37. Replevin; the defi. traversed the plt's. property. The plt. furnished one Chanly with goods, to be sold at a shop kept by him. C. was to pay for them at certain prices, as fast as he sold them; all over was to be his profits; the goods to remain the plt's property, and at his risk till sold, those not sold to be returned to the plt., those sold on credit to be at C's risk. Held, not fraudulent as to C's creditors: if *bona fide* or not, was a question for the jury.

5 Pick. 5-7, Patten *v.* Clark.

Art. 2. Con.

§ 2 *con.* 16 Mass. R. 406–420, Trull *v.* Bigelow; same principle as Sutton *v.* Lord and Goodale administrator *v.* Nicholls. See 1 Cowen, 622–645, ch. 86, a. 3, s. 14, 15.

2 Pick. R. 184–204, Somes by his guardian *v.* Brewer; same principle as in Sutton *v.* Lord.

2 Mason, 431, Dexter *v.* Harris.

A *bona fide* purchaser for a valuable consideration, without notice of any fraud, shall hold the estate against the original grantor and his heirs. A purchaser has not by law, constructive notice of all matters of record; but only of such, as the title deeds of the estate refer to, or put him on inquiry for.

Jackson v. Seward, 5 Cowen 67-73.

§ 9. Ejectment for a farm, &c.; case, April 16, 1818. William Seward, aged and infirm, seised in fee of this large farm, deeded the same to the deft., his son. Consideration expressed $10,000, with full covenants. The true consideration was the son's two bonds to his two sisters, both $4452 50 cts. to be paid 6 months after the father's death, and annuity to him of $500. (Not exceeding the rent.) The annuity was paid four years, all an honest transaction, at the time of which the father was guarantor to the plt's. lessor, Van Wick; he was then no otherwise a creditor. The lessor, after said deed was given, recovered judgment on this guranty, against the father, in April, 1820. for $2980 4 cts. Docketed Sept. 12, 1820: commenced in August, 1819. The covenant sued was dated Nov. 6, 1817, and gurantied to the lessor a certain judgment of $2700 against the son, in favor of the father, assigned to the lessor. The lessor took out a *fi fa* on his judgment against the father; whereon, said farm was sold at auction and conveyed to the plt's. lessor, Feb. 19, 1820, by the sheriff of Dutchess. So much proof the said deed to the son was fair and honest, that the plt's. counsel declined going to the jury upon it. The verdict for the plt. was merely for the opinion, on the single question, whether the deed to the son was fraudulent in law, as against Van Wick, the plt's. lessor. Held, it was. There it may be observed as material; it does not appear that the father retained any estate to pay his debts, when he gave his deed to his son. Held, 1. The father's guaranty was a debt when he gave the deed to his son, within the statute, though it could not be proved in a case of bankruptcy or insolvency: cited Jackson *v.* Myres, 18 Johns. 425. The New York act against frauds, avoids all conveyances, &c. devised and contrived with purpose and intent to delay, hinder, or defraud *creditors and others, of their just actions, &c.* This is not exactly like the 13 Eliz. Court, also, cited, Muntford *v.* Ranic, 2 Keb. 499, where the conveyance was held fraudulent, though the plt. had become creditor only by the escape of a prisoner, and though the bond on which the judgment was obtained, had been given many years after the conveyance; cited Twyne's Cas. 3 Co. 82; court observed in Jackson *v.* Myers, an action in *malificio*, finding it was noticed that the New York statute extends not only to creditors, but to all others who had *cause of action* or *suit*, or any *penalty* or *forfeiture*. On the whole, the court speaking of the father's said deed to his son, said 'it is a deed of gift to his children; and so intended by the grantor in perfect truth and honesty.' If this case be law, it is so on two grounds: 1. The father retained no property to pay just demands against him: 2. The words in the New York act extend *to all who had cause of action or suit against the father;* but query if at the time of the deed the

I. Ch. 32. Art. 2. Con.

lessor's right on his guaranty was only *contingent*, as the justice giving the court's opinion, seems to think it might have been; for the statute extends only to an *existing* right of action, that is, *a right to sue when the deed is given*, though recovering judgment be afterwards. As the statute speaks of a cause of action, that is, a *right of action*, it is a fair construction to hold, the act means an *absolute*, not a *contingent* right of action. On the whole, I see nothing to support the decision in this case, but the father's reserving no property to pay his creditors. This may be sufficient to constitute constructive fraud; the father at the time being in debt, aged, and infirm.

Art. 4. Con.

8 Wheat. 229, 252, Sexton v. Wheaton and wife.

§ 12 *con.* The plt. got judgment against Jos. Wheaton, in the county of Washington, District of Columbia, and filed her bill to subject the house and lot of his wife to pay her husband's debt. Judgment against him, and he appealed. Held, 1. A post nuptial voluntary settlement made by a man, when not in debt, on his wife, is valid against *subsequent* creditors: 2. The 13 Eliz. c. 5. avoids all conveyances not made on a consideration deemed valuable in law as against *previous* creditors; but does not apply to *subsequent* creditors, if the conveyance be not made with a fraudulent intent. Cited Shaw *v.* Standish, 2 Vern. 326; Taylor *v.* Jones, 2 Atk. 600; Stillman *v.* Ashdown, 2 Atk. 481; Fitzer *v.* Fitzer, 2 Atk. 50; Peacock *v.* Monk, 1 Ves. 127; Walker *v.* Burrows, 1 Atk. 94. One conveying must then be indebted, &c. Townsend *v.* Windham, 2 Ves. 11; Stephens *v.* Olive, 2 Bro. Ch. R. 90. See ch. 109. a. 9. s. 2, 3, the statutes 13 and 27 Eliz.; Lush *v.* Williamson, or Wilkinson, stated ch. 32. a. 13. s. 10; Glazier *v.* Hewer, 8 Ves. 199; Battersbee *v.* Farrington & al. 1 Swanst. 106. Decree in favor of the wife, &c. no fraud established. The court observed, as our titles to real estate are all recorded, creditors need not be deceived as to that, so not as in England.

A *bona fide* gift, though voluntary, is not fraudulent against *subsequent* creditors. 2 Mc Cord, 362.

2 Mc Cord, 152.

A marriage settlement, though not recorded, protects the property settled against a creditor, who knew of the settlement previous to the contracting of his debt.

5 Pick. 59, 60, Ward & al. v. Sumner.

§ 14 *con. Vendor's possession.* Replevin for household furniture attached by the deft. as the property of one King The plts. endorsed for him certain notes: before they became due he executed a deed of the furniture to them on condition to be void, if he saved them harmless. The deed and furniture were formally delivered in the presence of a witness. To him alone the transaction was made known. King remained in the possession and use of the furniture as before.

Held, the conveyance might be viewed as a mortgage, or as a pledge, according to the intent of the parties, and as the furniture remained in K's hands, it must be construed to be a mortgage; and there being no actual fraud, the mortgage was valid as against K's creditors. I. Ch. 32. Art. 4. *Con.*

§ 20 *con.* The plt. claimed a sum of money of the deft., who denied it, but promised that if the plt. would swear to the truth of the demand, he would pay it. The plt. accordingly made affidavit. Plt. recovered the amount sworn to. Not competent to the deft. to prove the plt. had sworn falsely, or that he was mistaken in his affidavit, or that there was any fraud in the case. 12 Johns. R. 274—363.—Broke v. Ball, 18 Johns. R. 337.

§ 8 *con.* 1 Litt. 112; principle as in Hamilton *v.* Russell: but adds, an evidence of a fair intent is inadmissible. But when the sale is such as not to be inconsistent with the seller's retaining possession, the fraud, if any, is not a conclusion of law, but a matter of fact for the jury. Baylor *v.* Smithers. But, 2. This doctrine does not extend to cases where there has been an adverse possession for five years without demand made and pursued by due course of law, &c. id; and 3 Marsh. 241, 242; 2 Bibb, 416; 4 Bibb, 70, 446, 458; Tenn. R. 91. A bill of sale of slaves, even for a valuable consideration, made by a person in debt, who subsequently retains possession, is void against creditors. Art. 11. *Con.*

§ 4 *con.* Lord Hardwicke's four kinds of frauds. 2 Mason, 378; 11 Wheat. 103–134; ch. 225. a. 7. s. 9. Vol. 7. Art. 12. *Con.*

§ 9. *Imposition on a weak mind.* Held, a court of equity has jurisdiction of a suit brought by heirs at law to set aside a conveyance obtained from their ancestor, (Comfort Wheaton,) by undue influence, he being so infirm in body and mind from old age and other circumstances, as to be liable to imposition, though his weakness does not amount to insanity: 2. In such a case not depending on absolute insanity of the grantor, at the time of executing the conveyance, the court may determine the question of capacity without directing an issue: 3. The verdict of the jury as to the insanity of the grantor at the time of the conveyance would not be conclusive; the court being competent to determine for itself the degree of weakness, or of imposition, which induces it to set aside the instrument: 4. In such a case a court of equity cannot make a final decree for the sale of the property, until all the heirs are brought before the court, as parties, if they are within the jurisdiction: 5. If all the heirs cannot be brought before the court, the undivided interest of those who are made parties may be sold. Bates *v.* Graves, 2 Ves. Jr. 287–295, similar 11 Wheat. 103—134, Harding and others, appellants *v.* Handy and Caleb Wheaton, respondents.

I. Ch. 32. Art. 13. Con.

case. See ch. 114. a. 27. s. 11. 12 Wheat. 199–206, like principle.

§ 2 *con.* A sale at auction, under process of law, cannot be invalidated for mere inadequacy of price. Livingston *v.* Byrne, on appeal, 11 Johns. R. 555. Accidental advantages made *after* the bargain can have no effect. Osgood *v.* Franklin, on appeal, 14 Johns. R. 527; see ch. 114. a. 17. s. 17: nor inadequacy of price, unless so palpable, as of itself, to afford proof of actual fraud; and in judging of this the condition of the estate when sold must be regarded. Id. 1 Starkie, 126; 1 Bligh, 137; Bos. & P. 172.

CHAPTER XXXIII.

FREIGHT.

Art. 1. Con.

§ 19. *Freight repaid*, &c. *Assumpsit* for money had and received. Held, if freight be paid in advance, and the goods be not carried for no fault in the shipper, he may recover it back, if no agreement to the contrary. 3 Pick. R. 20–26, Griggs & al. *v.* Austin.

§ 20. *Commercial Code of France as to freight.* Art. 273 prescribes the form and contents of the charter party. Art. 275, provides, if the vessel be freighted by the month, and no agreement to the contrary, the freight runs from the day of the vessel's sailing. Arts. 276 to 280, provide, in substance, if before she sails, her country of destination is interdicted, her charter party is dissolved, and neither party is liable for damages: shipper is at the expense of lading and unlading. If prevented sailing by superior force, a short time, it is not dissolved, and no damages on account of the delay; or increase of freight, if the detention, by such force, be during the voyage. During the detention, the shipper may unlade his goods at his expense, on condition to reship them or to indemnify the master. In case of the blockade of the port to which the vessel is bound, the master is required, if he have no contrary orders to go to one of the neighbouring ports of the same nation into which he can enter. The vessel, the rigging and apparel, the freight and goods laden on board, are respectively bound for the performance of the charter-party, or agreement between the parties. Art. 288: if, however, the freighter, not having laden any goods, break up the voyage before the vessel sails, he pays as an indemnity to the master, half the freight agreed on in the charter-party, for the whole cargo they agreed to put on board; and if the vessel receive a part of her cargo, and sail but in part loaded, the

whole freight is due to the master. Art. 296 : if the master is obliged to have his vessel repaired during the voyage, the freighter must wait or pay the whole freight : if she cannot be repaired, the master is bound to hire another vessel. If he cannot do so, the freight is due only in proportion to the part of the voyage performed. Art. 299 : the master loses his freight and is liable for damages to the freighter, if he prove the vessel was not sea worthy when she sailed. This proof is admissible, though contrary to the certificates of survey when she departed. Art. 300 : if the vessel be arrested in the course of her voyage by order of a sovereign power, no freight is due for the time of her detention, if chartered by the month ; nor increase of freight, if chartered for the voyage. The wages and maintenance of the crew, during the detention, are reputed an average loss. Art. 301 : the master is to be paid the freight of the goods thrown overboard for common safety, at the charge of a general contribution. Art. 302 : no freight is due for goods lost by shipwreck, stranding, or pillage of pirates, or capture of enemies. The master is held to refund the freight, if paid in advance, unless there be a contrary agreement. Art. 303 : if the vessel and cargo be ransomed, or if the cargo be saved from shipwreck, the master is paid his freight as far as the place of capture or shipwreck ; and all his freight, if he contribute to the ransom and carry the goods to their destined place. Sailors' wages are not subject to contribution. See 2 Taunt. 407, Morrison *v.* Parsons, as to freight in case of a mortgage.

Ward & al. *v.* Green, 6 Cowen, 173, 178, error from the common pleas.

§ 21. Green brought *assumpsit* against the Wards, and laid the common money counts. June 27, 1825, the defts. owned the Morgiana, James Allen, master. Green gave in evidence the following receipt signed by the master, ' Received of Benjamin Green 270 Spanish dollars, deliverable at New York, dangers of the seas excepted, unto the said Benjamin Green, one-and-a-half per cent. primage. New Orleans, the 27th June, 1825.' The plt. below rested on this evidence. Wards gave in evidence the freight list of the ship, dated June 28, 1825, containing various articles, in the names of various shippers, on various consignments, which did not include the dollars. A receipt, signed by H. Ward, one of the owners, of even date with said receipt, acknowledging the receipt of $15 of the plt. as his passage money to New York, in the steerage. Deft. proved Green was a passenger, and that H. Ward sailed as supercargo. Agreed, the master's contract for the specie was made without the knowledge of H. Ward, and that he knew nothing of it till after the specie was stolen as the master stated. On these facts, held, 1. The master aboard is the agent

I. Ch. 33. *Art.* 1. *Con.*

of the owners, and has power to bind them as to the freight: 2. Where one of them is on board and exclusively attends to the shipments of the cargo, he is not bound by the master's contracts, but to show he is not liable, he must prove the fact that he was exclusively attending to the shipment of the cargo, and he must show the same thing, though on board as supercargo: 3. It is not enough one of the owners is on board, as supercargo; and where this was the case, and the master of a general *ship* receipted dollars, as above, and they were so stolen on the voyage, the owners are liable: 4. A *general ship* is one in which the master or owners engage separately with a number of persons, unconnected with each other, to convey their respective goods to the place of the ship's destination. The Morgiana was a general ship. See King *v.* Lenox, 19 Johns. 236; 11 Mass. R. 99; 4 Greenl. 407; Bee's adm. R. 353–369; 7 Cowen, 564.

Art. 2. *Con.* Welch *v.* Hicks, 6 Cowen, 504–511.

§ 23 *con. Assumpsit* for freight of the ship Romeo, from St Petersburgh, in Russia, to Provincetown, in Massachusetts. Her owner declared he received goods on board at St Petersburgh, consigned to the deft. at New York, but the ship was forced by the violence of winds and tempests, to put into Provincetown on her voyage to New York, where the deft. elected to receive his goods, and did receive them, and released the plt. from his obligation to transport them to New York; added counts suited to full and *pro rata* freight. Verdict for the plt., new trial granted. Held, 1. Where a ship is disabled from prosecuting her voyage by perils of the sea, and puts into an intermediate port, and the goods are received there by their owner, he is liable for freight *pro rata itineris*: 2. In such a case, where the master, without sufficient cause, refuses to repair his vessel and send on the goods, and to procure other vessels for the purpose, the owner may immediately demand his goods, and be discharged from freight, both full and *pro rata*. To entitle to *pro rata* freight, the acceptance must be voluntary, as in this case, the master might have repaired in two or three weeks, or obtained other vessels in Provincetown. See 12 Wheat. 383; 1 Mason, 43; 7 Cranch. 358; 1 Edwards, adm. R. 246; 3 Binn. 437; 5 Binn. 525: these, and several other cases appear to have been decided on this distinction: if the owner accept *voluntarily* his goods at an intermediate port, he pays freight *pro rata*, &c., if by *compulsion* he does not so pay; also 15 Johns. 332; 17 id. 722; Brod. & Bing. 379; 7 Cowen, R. 564.

§ 37. The ship owner may put into port and repair his ship in two months, and then proceed in order to earn his freight, the want of repairs being occasioned by a storm in the voyage, though by

the delay, the cargo (tobacco) may lose its best market. 2 Pick. R. 104–112; Hen. Clark *v.* Mass. F. and M. Ins. Com.; see 16 Johns. R. 348; Palmer & al. *v.* Lorillard: Hadley *v.* Clark & al. 8 D. and E. 259. I. Ch. 33. *Art.* 2. *Con.*

§ 38. *Consignor liable for freight;* as where the deft. owned goods, and shipped them in the plt's. vessel to be carried from New York to Liverpool, and there to be delivered to A, consignee, 'he paying freight for the same, with primage,' &c., according to the bill of lading signed by the master; who, when he arrived at Liverpool, delivered the goods to A, not then receiving the freight, though he afterwards demanded it; when payment was refused. Held, the plt. had an action for the freight against the consignor: 2. It seems, where the consignor is not the owner of the goods, and they are not shipped for his account and benefit, he is not liable for the freight on such a bill of lading: 3. In all cases it is the master's duty to endeavour to obtain the freight of the consignee. Baker *v.* Havens, 17 Johns. R. 334. 6 Serg. & R. 429.

§ 39. *Lien* for freight on the goods. This is the result of usage in trade, and does not exist where the parties by special contract provide for the freight. Chandler *v.* Belden, 18 Johns. R. 157.

§ 9. In Pothier on maritime contracts in 1821, are found the following rules as to freight. Art. 3. *Con.*

1. A ship may be let to hire in whole, or in part, as by the ton of 42 cubic feet, or by the quintal of 100 weight.

2. If no freight be agreed, the merchant pays the usual freight.

3. If he put his goods on board without the master's knowledge, he may reland them; but if knowing they are on board, he proceeds to sea with them, a mutual contract is presumed, and this constitutes a contract of charter party, and the master must carry and deliver the goods; but by the French maritime ordinance of Louis XIV., the master has the highest freight.

4. The contract of charter party is complete by the consent of the contracting parties; the writing is only proof of it.

5. The master is not bound, by the bill of lading, as to the *quality* of the goods; and as to the weight he may add, 'as it is said,' if the owner of the goods do not offer proof of the weight: it is to be made in the master's presence.

6. The master engages his ship is fit for the voyage, properly maned and documented: if not so he looses his freight, and is liable in damages.

7. He has no excuse for not delivering the goods, but superior force, as storms, &c., and sovereign power preventing him. If liable for failure, he pays the price of the goods at the port of delivery, deducting freight and charges.

8. If the consignee refuse to receive the goods, and the mas-

I. Ch. 33. *Art.* 3. *Con.*

ter is in no fault, he may get an order to sell enough of them to pay freight and charges, and may deposit the residue in some magazine at the owners' risk.

9. If the master let the ship where the owner lives, without his knowledge, he is not bound, but the master is.

10. The master has his freight if he delivers the goods, though spoilt.

11. If on the passage he is prevented by superior force to proceed, he is not bound to get another vessel, but may claim his freight for the part of the voyage performed.

1 Mason, 48, Sampayo *v.* Palter.

But where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of her cargo has been restored, and sold at the same port, no freight is due for the cargo restored. In Luke *v.* Lyde, and similar cases, the owner of the goods carried part way, voluntarily received them, and dispensed with the further transportation.

CHAPTER XXXIV.

GAMING.

Art. 2. *Con.*

§ 6. A, plays away B's money to C; B may have *assumpsit* for money had and received, and recover his money of C.

17 Mass. R. 560—564, Mason *v.* Waite.

As where the plt., delivered a parcel of bank notes to a carrier, who paid them to the deft. for a loss at a faro table. The plt. recovered the amount of the debt, with interest.

3 Pick. 446—450, Babcock adm. *v.* Thompson.

§ 7. *A bill of particulars.* Held, this bill must give as much information as a special declaration, so that the deft. may know the real ground of the action: 2. It may be amended: 3. If not sufficient, or if not supported by proper evidence, the plt. may be nonsuited. 4. All gaming is unlawful. Money lost at gaming by fair or foul play, cannot be recovered back by the loser, nor by his executor or administrator, in an action commenced after three months from the losing. See a. 5 s. 13: 5. The plt. cannot recover where he must show *his own illegal act* as the foundation of his demand: this is a settled principle in the civil and common law, generally.

3 Rand. 214—220.

§ 8. Equity relieves against a judgment for a gaming debt, though the party failed to defend himself at law, and therefor give no good reason: see ch. 13, a. 1. s. 3; seems contra: 2. Where a part of a bond is on *gaming* consideration, and the other part for a *legal* consideration, equity relieves as to the vicious part, and supports the good part; the obligor being plt. in equity; as he asks for equity he must do it.

Jones *v.* Sevier, 1 Litt. 50.

§ 9. A loses money at unlawful gaming; gives his note to a third person, he having given the winner an adequate consideration for it, is valid, though such third person had full knowledge

of the whole transaction. p. 409. The plea need not be sworn to, alleging the note sued was given to secure the repayment of money lent for the purpose of gambling; and 3 Marsh. 499. I. Ch. 33. *Art.* 2. *Con.*

§ 10. The issue was, whether a note was given on a gambling consideration or not. Held, evidence the payee had the general character of a gambler was not admissible, but evidence was admissible to prove he in fact was a gambler. Chambers v. Simpson, 3 Litt. 290.

§ 11. Held, *assumpsit* for the price agreed to be given for a note sold; which note was given for a gaming debt. B loses money fairly at play, and voluntarily pays it, he cannot recover it back at common law: so is the case, if won fairly, and the loser voluntarily pays it, knowing all the circumstances. Herd v. Vincent, 1 Tennessee R. 369. Whiteside v. Tabb, Cooke's R. 387.

CHAPTER XXXV.

GUARDIANS, IDIOTS, MINORS, NEXT FRIENDS.

§ 1. 'The common law of guardianship in socage, never prevailed in chancery.' 1 Hop. Ch. R. 226. Art. 1. *Con.*

§ 1 *con.* The guardian's general bond does not embrace monies arising from the sale of the minors' land. In case of partition and sale, he gives a bond with sureties for the special purpose. 1 Hop. Ch. R 512—514.

In debt on the guardian's bond to the judge of probate, the general plea of performance is a good plea: 2. If he neglect to account, to charge him on his bond, therefore, the judge first cites him to render his account. The guardian by his bond is not held to render his account '*until he shall thereunto be required*,' and required by the judge; Mass. stat. 1784, ch. 55, Maine stat. 151, s. 1; 8, and 9, W. and M. ch. 11, not adopted. The many cases cited, generally, have been cited in this work. 1 Greenl. 186—195, Bailey judge v. Rogers & al.

§ 15 *con.* The court will not appoint any of its officers, as such, to act as guardians; nor any person, without his written consent. Justice may appoint one *ad interim*, and must be a real person. 2 Cowen, 430; 2 Johns. 192. 1 Hop. Ch. R. 102.

§ 19 *con.* Notwithstanding this provision, &c., the legislature has power to license sales of such estates. This power is not of a judicial nature. It decides no controversy, nor affects title to property: if judicial, the legislature cannot exercise it without violating the constitution. 16 Mass. R. 326—332.

Massachusetts act, March 2, 1829, impowers the Supreme Judicial Court to authorize some person to sell all, or part of the real estate of minors, or persons *non compos mentis*, and to put the proceeds out on interest, however the estate may have been acquired.

I. Ch. 35. *Art.* 1. *Con.*

§ 30 *con.* Decided the incapacity to sell, &c. created in a spendthrift by the stat. of 1818, ch. 60, does not extend to his promissory note. 3 Pick. 229–231, Smith *v.* Spooner.

And, 5 Barn. & Cres. 170, a tradesman supplied A with goods suited to his station, and afterwards by an inquisition taken under a commission of lunacy, A was found to have been lunatic before and at the time, of the supply. Held this was not a sufficient defence to the action, for the price of the goods; the plt. when he received the orders and supplied, not having any reason to suppose the deft. was a lunatic.

Art. 3. *Con.*

1 Hop. Ch. R. 309—339. Kirby & wife *v.* Archibald Turner, John Thompson, John Taylor, adm'rs. of James Dunlap.

§ 21. *Several guardians and surety, how liable.* In 1801, John Turner, Jr. died, having bequeathed to his daughter Maria Eliza Turner, (Mrs Kirby) a large real and personal property, and made Thompson and Dunlap executors, who had the personal estate in their possession. In June, 1806, they, and A. Turner, were appointed her guardians, and in Aug. 1807, they delivered her personal estate to said A. Turner, acting guardian. The three guardians when appointed, and John Taylor *their* surety, gave a joint and several bond in common form. When Miss Turner came of age, she voluntarily released Thompson, Dunlap died, and A. Turner, (her brother) became insolvent, though rich when he received her property. Held, 1. Thompson and Dunlap, *as guardians*, never had her property: 2. It was correct for A. Turner to be acting guardian, and receive it: 3. The three guardians were not sureties for each other: 4. Were *jointly* bound for their *joint* acts, and *severally* for their several acts: 5. Miss Turner's release to Thompson, discharged him, as her guardian, and in it she excepted, and did not discharge A. Turner: 6. Where several jointly, or jointly and severally, owe a debt, a release to one is a release to all, it supposes payment: 7. Not so when several are *so trusted;* then a release to one discharges him only: 8. Taylor was surety for all and each of the guardians, was released as to Thompson, but not as surety of A. Turner. Bill dismissed as to Thompson and Dunlap's administration, with costs: As to the other parties referred to a master, to ascertain and report the amount with which A. Turner and Taylor are chargeable, for the separate acts and defaults of A. Turner as guardian. Many cases cited.

1 Hop. Ch. R. 337—341.

§ 22. Minors obliged in chancery to elect, to confirm an agreement or relinquish all benefits under it, on which they had recovered at law. But as they refused to sign, how could this writing be their contract, voidable only so as to bind the adults, the other party. A contract for minors to sign, but they refuse to sign it, must be as to them, null and void, though voidable only if they sign, but the adults released, and the guardian of the minors, by parol, agreed for them as to lands.

§ 23. *Sale of minors' real estates*: Not allowed, till the master's report is made, in full compliance with the 88th general stat. of the court of chancery. 1 Hop. Ch. R. 341. II. Ch. 35. *Art.* 3. *Con.*

§ 24. The writ of *ravishment* of ward, (see s. 15) is used in South Carolina, to try the slaves' right to freedom. 1 M'Cord, 469.

§ 3 *con.* *Assumpsit* on a promissory note. Deft. pleaded infancy: plt. replied a new promise when of age made to the officer when he had a writ to be served on him. He said he owed the plt., but was unable to pay him; he would, however, endeavour to get his brother to be bound for him. The writ was immediately served. Held, no confirmation of the promise; which should be *before* the action is commenced, and direct and to the plt., not to the officer, voluntarily, not under the terror of an arrest, and with a knowledge he was by law, discharged. A mere acknowledgment of the debt, is not sufficient. See 9 Mass. R. 64; 10 do. 137; 4 Pick. 48–50. Art. 5. *Con.* 1 Pick. R. 202-204, Ford v. Phillips.

The father can recover the wages of his minor son, though he at a distance contracts for them, and makes a settlement, and takes a note payable at a distant day. 3 Greenl. 77-81.

§ 16. *Assumpsit*; account annexed; on a promise to pay an annuity for dower released, &c. Held, an award on a guardian's submission that an infant heir shall pay an annuity to the widow in lieu of dower, is voidable, but not void: 2. A letter from the heir, when of age, inclosing money, and saying 'you will find inclosed the sum of ——, in part towards your right of dower, the remainder I shall forward you in a few days. It was entirely unexpected to me that it was not paid before, as I had lodged property in A's hands to meet an annual payment.' Held, this is a confirmation: 3. Held, also, a ratification when one after come of age, accept the estate free of dower, and enjoys it several years on his guardian's contract: 4. The letter ratified the award. Court cited 4 Leon. 4; 2 Buls. 69; Cro. J. 320; Godb. 120; 1 Rol. Abr. 731, ch. 45. 1 Pick. R. 221-224, Barnaby v. Barnaby.

§ 17. *Where guardians may recover back from a spendthrift's estate, monies paid, &c.* *Assumpsit* to recover monies the plts. as guardians of the deft's. intestate, a spendthrift, they had credited in their account settled at the probate office. The plts. sold his real estate, by license of court, and so credited the proceeds, and apply them to pay his debts, some by one plt. and some by the other. Afterwards the letters of guardianship were revoked, and the spendthrift and his heirs avoided the sales; there was no power to grant the license. Hence the plts. were compelled to repay the purchase money on the covenants. Held, 1. The plts. had a right of action against 4 Pick. 288—298, Shearman & al. v. Akins, adm'x.

II. Ch. 45. *Art.* 5. *Con.*

the deft. for the amount refunded, so much having been paid by them for the spendthrift, on a consideration which had failed: 2. That the right did not accrue till the sales were avoided and the money refunded, hence the act of limitations began to run only from that time: 3. The plts. properly joined in the action: 4. The receipts of persons out of the State are admissible, proving their hand writing as evidence of charges in a guardianship account, of payments made to such persons. As to the joinder, see Osborn & al. *v.* Harper, ch. 42, a. 3, s. 6.

Art. 6. *Con.*

2 N. H. Rep. 435–438, Lang *v.* Whidden.

§ 5. Writ of entry; and the demandant counted on his own seisin and the tenant's disseisin. Held, if an idiot be under guardianship, a suit may be instituted by the guardian in the name of the ward, without any mention of the guardian; and the suit will be sustained: 2. In such a case, the idiot, by his guardian, may prove, that the deed, purporting to be executed by him, was signed when his faculties were so feeble as to unfit him for transacting business; in this way he may satisfy himself, and avoid his deed; but this course may be prevented, if advantage be taken of the defect, before pleading the general issue. The demandant, in the case, is called *an idiot*; but in fact was *a non compos mentis*; and the notion a man cannot be allowed to stultify himself, is rather rejected, and various cases cited, 15 Johns. R. 503, deft. allowed to prove he was *insane* when he gave the note.

§ 7 *con.* The old rule seems to have been, as in Beverley's case, and is said to be so still, in the case of a feoffment with livery of seisin. The idea was, the deed was *voidable only*, and so must be avoided by pleading; but as soon as it was conceived the deed was *void*, and the insanity proveable on *non est factum*, the old notion yielded to one more rational, as in Thompson *v.* Leach, Comb. 468; Sugden on Power, Am. Ed. 1823, 403. So the question of insanity may be properly left to evidence, on *non est factum*, at least in most cases. See on this subject of insanity, intoxication, &c., 4 Desaus. Ch. R. 364; 6 Munf. 15; 3 Day's R. 90; 2 Hayw. R. 394; 1 Bibb's. R. 406.

5 Pick. 20–27, Holyoke *v.* Haskins.

Writ of right. Held, 1. The domicil of a person *non compos mentis*, under guardianship, may be changed by the direction, or with the consent of the guardian, expressed or implied. See 9 Mass. R. 543.

5 Pick. 217–220, Waite *v.* Maxwell, Adm'r.

Covenant on the intestate's deed. Held, the deed of *one non compos mentis*, not under guardianship, conveys a seisin, being only *voidable*; and page 431–435, Mitchell & al. *v.* Kingman. *Assumpsit* on a promissory note, deft., by his attorney, pleaded never promised. Held, 1. A person may

plead that he was *non compos mentis*, or show it in evidence under the general issue, to avoid his contracts: 2. If he plead by attorney, and on examination it appears he is still *non compos*, his plea may be treated as void, and a guardian *ad litem*, may be appointed, who may plead *de novo*. II. Ch. 36. *Art.* 6. *Con.*

§ 15 *con.* *Assumpsit* on a negotiable note made by a minor. Held, 1. Such note is not void, but may be ratified by him when of age: 2. His repromise is valid, though made after the note is sued: 3. His debts, when proved in the usual manner, are presumed to be 'justly due,' and when he promised to pay 'all justly due,' if fraud or injustice existed the proof of them devolved on him. 2 N. H. Rep. 51–56, Wright v. Steele. Plt. in review.

§ 3 *con.* A natural guardian cannot lease the land of his ward, but his lease is void. 369–372, Anderson *v.* Darby & al., by their next friend; cited 7 Johns. R. 157; 2 Wils. 129; 2 Mass. R. 55. Art. 7. *Con.*

Nor can guardians of minors waive any benefit settled on them by a decree, and it is error to decree on such consents. 2 Rand. 409—417.

§ 12 *con.* If a minor take a deed of land and mortgage it, all *one contract*, and remain in possession, or sells it, after of age, he confirms the whole transaction, the grant and mortgage being both the same day; nor did the mortgagor avoid the mortgage by selling with warranty after of age. See Holbrook *v.* Finney, ch. 130. a. 4. s. 58; Kimball *v.* Cunningham, Jr. ch. 32. a. 4. s. 3; Badger *v.* Phinney, ch. 171. a. 13. s. 17. Art. 8. *Con.* 1 Greenl. 11 14.

Minors not bound as devisees to pay legacies, &c. A devised lands and bequeathed personal estate to his son, making him executor of his will, and directing him to make certain annual payments to his mother during her life. The son assumed the trust and entered on the lands, and made the annual payments, and then died, leaving minor children, who, by their guardian, entered into the land. Held, they were not liable *in assumpsit*, during their minority for the yearly payments accruing after their father's death. The action was brought by the mother. The devise to the son of the lands, was requiring him to pay, deliver and perform to her, as above stated in the will. Statement of facts decided as above. The cases cited for the plt. were of devisees *of age, not minors in assumpsit*. Same principle in the case of a deed instead of a will. 2 Greenl. 157–162, Haskell *v.* Haskell & al. pp. 163, 165.

§ 16 *con.* A minor buys land and his friends *of age* give their note for the price, and he promises to pay when of age, and when of age he, by a *memorandum* on the bottom of the note, *acknowledged himself holden as co-surety*,—in an action 2 Greenl. 186–191, Thompson *v.* Linscott.

II. Ch. 35. *Art.* 8. *Con.*

against him by the payee, as an original promisor, held, the plt. might show by *parol* that the promise was for the deft's. own debt, and not a collateral engagement, so no new consideration necessary to be proved. Deft. remained on the land ever after he purchased it. See Packard *v.* Richardson, ch. 1. a. 25. s. 1, &c.

Art. 9. *Con.*

3 Pick. R. 202.

§ 4. The court said 'we go so far as to say, that where a minor son makes a contract for his services on his own account, and the father, knowing of it, makes no objection, there is an implied assent that the son shall have his earnings.'

2 Barn. & Cres. 824–827. Thornton *v.* Illingworth.

Assumpsit for goods sold to the deft. for the purposes of *trade*. Plea, infancy. Replication, the deft. ratified the contract after he came of age. Evidence of this new promise made by the minor *after* the action was commenced, did not sustain the replication. The judges held the original contract was absolutely *void*, and not merely *voidable*, therefore, when the action was commenced there was no ground for it; and it is the *moral* obligation to pay the minor is under, and his *actual* promise thereon, that creates the new ground of action; but in the present case that was created after the commencement of the action.

Art. 11. *Con.*

3 Mason, 482–486, U. States *v.* Green.

§ 4 *con.* On a *habeas corpus* to restore a female infant, about ten years old, to her father, the court will look into all the facts of the case, stated in the return, and will not discharge the deft. (grandfather) merely because he returns the infant is not in his power, possession, or custody, if the court be not satisfied that all the material facts are disclosed: 2. An attachment is the proper remedy to bring the party into court, if not in court, and when he is, the court may immediately direct him to answer interrogatories: 3. The father is not of course, on this writ, entitled to the custody of the infant, if brought into court; but the court, when called on to act, will exercise its discretion on the subject, and place the infant where it will be most for its benefit. Cited 5 D. & E. 89; 10 Johns. R. 328; 13 do. 418; 5 East, 221; 10 Ves. 52; 2 Stra. 982.

Art. 12. *Con.*

1 Pick. R. 198.

p. 206, 211.

§ 7 *con.* When a guardian neglects to settle his account, the administrator of his surety may settle it. In this case the guardian had been removed and another appointed. The guardian settled an account in the supreme court of probate, which in an action on the probate bond was found to be fraudulent and void, as against the sureties. Held, he could not be cited anew before the probate judge to settle a correct account.

1 Pick. R. 527–530, Fay, judge, &c. *v.* Howe.

§ 17. *Compound interest*, when allowed. Debt on probate bond of a guardian of a spendthrift. Large sums of

money having come into his hands of minors, arising from rents, public stocks, &c. and no account settled for many years: ordered an account be settled with *rests* for every year, and the balance thus struck carried forward to be again on interest whenever the sum should be so large that a trustee acting faithfully and discreetly would have put it into a productive state. I. Ch. 35. *Art.* 12. *Con.*

§ 18. ***Settlement of accounts, &c. or sureties discharged, &c.*** It is the proper construction of the act of 1795, ch. 15. that an infant must, after arriving at full age, not only 'call on his guardian for a full settlement,' but must also have a final adjustment of all accounts within three years, and either sue for the balance or notify the sureties in the guardian bond of the state of his affairs; and if the minor, come of age, fail so to do, the sureties will be discharged. The county courts have a discretion to appoint whom they please guardians generally, or *ad litem*, to minors under or over fourteen years of age, and within their jurisdiction. Johnson v. Taylor, 1 Hawks. 271, &c. 1 Murph. 88, 227, 231, 336, 441.

CHAPTER XXXVI.

INDEBITATUS ASSUMPSIT.

§ 2 *con.* If A purchase of B a foreign bill of exchange and lose it, before presented, and B refuses to give another, A has this action for the purchase money, and may declare for money had and received to the plt's. use. 3 Call, 373.

A gives a bond to B, he tranfers it to C, but *without assignment:* C uses due diligence to recover it of A, but cannot, C may have this action for money had and received against B. 2 Wash. 219.

So if a jailor, without knowing the facts, thinks the debtor is able to maintain himself, receive prison fees, on his account of the creditor, and pay over to the debtor the money so received, the creditor, in this action, may recover the amount of such fees of the jailor. Money had and received, &c. Rose *v.* Shore, 1 Call, 540. But the plt. in this action *of assumpsit*, to recover, must state in his declaration a consideration, if not judgment must be arrested, though it rest on a written agreement. Mosely *v.* Jones, 5 Munf. 23; 3 Munf. 550. But references had to act of jeofails of 1819, ch. 128, s. 2, and s. 103.

§ 7 *con.* In this action on a *parol* agreement, one *in writing not sealed* of the same purport may be given in evidence to support the action. The writing does not change the nature of the contract, but is merely evidence of the *parol* agreement, and being the best evidence, *ought to be produced*, though not specially declared on. 1 Wash. 199.

II. Ch. 36. *Con.* Held, a negotiable promissory note may be given in evidence under a money count in an action by the endorsee against the maker. 4 Pick. 421, 422.

So 7 Wheat. 35–38, Page's adm'r. *v.* The Bank of Alexandria: a bill or note, is *prima facie* evidence, under a count for money had and received, against the drawer or endorser; but the presumption, that the contents of the bill or note have been received by the party sued, and for the plt's. use, may be rebutted by circumstances; and a recovery cannot be had in such a case where it is proved that the money was actually received by another. This action by the endorsee, the bank, against its *immediate* endorser. The bank show the money was paid, not to the endorser, Page, but to the maker of it, Hodgson, and for his sole use for whose accommodation the note was made. The note was payable in *fifty days after date*, but was declared on as a note on *demand*: this variance was fatal.

Stating an account is in the nature of a new promise. 17 Johns. R. 38.

§ 21 *con. This action lies in certain cases, though a bond has been given for the balance of accounts:* as where the receiver of public monies gives an official bond, this does not extinguish the simple contract debt, arising from a balance of accounts due from him, to the United States, an action for this balance and another on the bond against the principal and sureties may be maintained at the same time: 2. Though the action against the receiver do not describe him in his official capacity, yet evidence may be given of monies received in that capacity: 3. Under a count for money had and received, evidence may be given of public stock received by him, when by law receivable at par in payment for lands sold by the United States: 4. Under the 2d and 4th sections of the act of March 3, 1797, ch. 368, a certified transcript from the books of the treasury, is evidence against the deft., and at the trial he can make no claim for any credit, which has not been presented to and disallowed by the accounting officer of the treasury, (unless in the case excepted by the act,) though no proceedings have been had against the debtor under the act of March 3, 1795, ch. 289, by notification from the treasury department, requiring him to render to the auditor of the treasury his accounts and vouchers for settlement.

§ 22. *Goods sold on credit, &c.:* if for six months, &c. this action does lie till that time is expired; but if the vendee refuse to take them, the vendor may immediately sue for damages for the breach of contract; and if resold at the vendee's risk, the measure of damages is the difference of price between the first sale and the resale.

5 Serg. & R. 19.

CHAPTER XXXVII.

INNKEEPERS.

§ 3. A traveller, who had saddlebags, in which were $200, on lighting at the inn, delivered the bags to a servant of the innkeeper, but did not inform either that money was in them. They were placed in the bar-room, and were afterwards found on the lot, cut open and the money gone. Held, the innkeeper was liable. So 14 Johns. R. 175, Clute *v.* Wiggins, held, not necessary to make him liable that the goods should be delivered into his special keeping, nor to prove negligence. But if the trust was not reposed in the innkeeper, but in another person, who was not in the capacity of a servant, but occasionally in the business of the family, the innkeeper is not liable if the goods be lost.

Jones, Am. Ed. A. D. 1828, p. 94.—Guinton *v.* Courtney, Hayw. N.Car. R. 41.

1 Yeate's R. 34.

§ 4. A house of public entertainment, in London, in this case, a tavern and coffee-house, where lodging and entertainment are provided for travellers and others indiscriminately, but which was not frequented by stage-coaches and wagons, and had no stables belonging to it, was considered as an inn, and the owner subject to the liabilities of an innkeeper, *even* where the guest did not appear to have been a traveller, but one who had previously resided in ready furnished lodgings. But it seems a coffee-house is not an inn in a policy of insurance against fire. It was observed, an inn has stables wherein lights are used at all times of night.

Art. 3. *Con.*

Thompson *v.* Lacy, 3 Barn. & A. 283.—American edition, A. D. 1828, of Sir Wm. Jones on Bailment, 94.—Doe *v.* Caming, 4 Camp. 77.

§ 4. To support an action against an innkeeper for goods lost, the plt. has only to prove the deft. kept a common inn, that the plt. was a guest, that the goods were brought to the inn, and were in the care of the deft., and were lost.

Art. 4. *Con.*

Guinton *v.* Courtney, 1 Hayw. 40.

§ 5. *An inn or public house is not a nuisance.* In his lease the lessee covenanted he would not do any act, matter, or thing, on the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighborhood; and the proviso for the re-entry was, that the lessee should not permit any person to inhabit the premises, who should carry on certain specified trades or businesses (that of licensed victualler not being one of these,) or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants. Held, that opening of a public house upon the premises, was not a breach of the covenant or proviso. This case was sent by the Master of the Rolls for the opinion of the Court.

Art. 6. *Con.*

1 Barn. & Cress, 715, Jones *v.* Thorne.

II. Ch. 38. Art. 1, *Con.*

CHAPTER XXXVIII.

INSIMUL COMPUTASSET.

§ 20. In support of an account stated the plt. need not prove the several items that make up the account. Phil. Evid. 89. The admisson of a debt on a single article is sufficient to enable the plt. to recover. 13 East, 249—5 M. & S. 65. This latitude allowed to the deft. of late years, to dispute the several items has rendered an account stated but of little importance: therefore, in late reports, we find but very few actions brought, or claims made, by plts. on accounts stated or *insimul computassets.*

CHAPTER XXXIX.

INSOLVENCY.

Art. 1. *Con.*

§ 1 *con.* As to several insolvent estates conveyed to trustees for creditors. See assignment, ch. 14, and trustees, ch. 114 a 14. Vol. 4.

§ 5 *con.* The real estate of one insolvent, deceased, descends to his heirs, and they are entitled to the rents and profits of it, until sold for the payment of his debts, and if mortgaged till entry of the mortgagee. 16 Mass. R. 280–288. Gibson & al. by their guardian *v.* Farley & al. (administrators,) sued as bailiffs and receivers of the plts. 5 of 9 of the heirs of Abraham Gibson, the administrators collected rents, meaning to account for them, as the law should decide. Action *assumpsit* for money had and received. The creditors lose such rents.

§ 9 *con. Insolvencies by the parties by agreement,* wherein no *statutes of insolvency.* See Post.

17 Mass. R. 454, Marston &c. trustees of James Kimball.

The insolvent debtor against Coburn the officer attaching Kimball's goods, for Reed, &c. Before the attachment, Kimball assigned all his property, except furniture, to said trustee for the payment of all his debts *pro rata.* The assignment intended was by a tripartite indenture between the debtor, the trustee, and creditors, who should execute it. It was executed by the debtor and trustees, and then taken by him to get the creditors to execute, no counter part having been made. After some of the creditors had executed it, and before it was delivered to the trustee, the goods were attached by Reed, &c. as above. The trustees brought replevin, and held the attachment was good and valid; for when the attachment was made, March 1, 1820, the assignment was incomplete, though signed by the debtor and trustees, Feb. 26, and three Boston creditors, the 28th and 29th, whose debts amounted to $1700. But the 26th

the trustees paid no consideration; the goods amounted to $5000, no schedule of them was made, and no delivery of them to the trustees, till the evening of the 29th, and then by delivering to them the key of the debtor's store; nor was the indenture delivered by him to them until after the attachment. If there was a formal delivery of it the 26th, it was of no avail, and then there was no consideration, as no creditors had then signed; and till they executed, or some of them, it was not intended it should take effect; this is a good leading case, as it shews what ought to be done to make one of these voluntary insolvencies valid, of the mere contrivance of the debtor, and of a friend or two of his.

§ 10. *Fraudulent schedule.* On a composition between debtor and creditors, if he furnishes a statement of his affairs, as the basis of the agreement he is answerable for the truth of it: 2. Any one material misrepresentation avoids the whole: 3. He will be obliged to account for all the property he held, not in his schedule or statement, and answerable for misstating his debts. 1 Hop. Ch. R. 284–288, Irving & al. v. Humphrey. And pp. 306–308.

See an important case of fraudulent assignment by one insolvent. Ch. 14 a. 3, 25.

§ 11. *United States debtor insolvent.* One who has received his certificate of discharge from arrest and imprisonment under a State insolvent law, is not entitled to be discharged from execution at the suit of the U. States.

§ 12. A creditor agrees with his insolvent or embarrassed debtor that if he will procure the security of a friend for a certain part of the debt, he will release the residue, and the debtor perform the agreement, it constitutes a valid contract, and if the debt be due on judgment, and the creditor by levy collect it, the debtor may recover damages for the breach of contract by action. Stra. 436; Heathcote *v.* Cruickshanks, ch. 39 a 3, s. 2; 5 Co. 237; 11 East 370; ch. 32 a. 1, s. 3; ch. 1, a. 22, s. 1; a. 20, s. 3; ch. 18, 3, s. 22; ch. 9, a. 7, s. 3. 1 N. H. Rep. 279.

§ 5. *An insolvent's fraudulent possession, a strong case.* Trover for three fourths of a ship; plea, general issue. T, sole owner of her, by indenture, June 24, 1819, assigned three fourth shares of her to the deft., a creditor, as security for his deft. By the deed he was to reconvey the same on payment of his debt and had a power to sell on non-payment before June 24, 1822. T was to be permitted to freight the ship, and to load cargoes, from time to time, &c. and to insure for the amount of the debt in the creditor's name, or otherwise to assign the policies to him. The deed was in due form, the certificate of registry duly inserted, &c. When the deed was executed, the ship was abroad, in North America. She returned July, 1819, 1 Barn. & Cres. 588–604, Kirkby & Blackburn, assignees of J. Thompson & Hodgton.

II. Ch. 39. Art. 3. Con.

to her port of registry, and was constantly employed by T, the debtor, from that time to February 1822, in carrying cargoes for his own use and on his sole account, and he continued all that time in the actual and sole possession of her, without the interference or control of the creditor. T having become a bankrupt; held, that as he had once owned the whole ship, and had never done any thing *to make it notorious to the world* he had ceased to be the owner of the three fourths, he continued to be the *apparent* owner of the said three fourths, *with the consent of the true owner*, down to the time of the act of bankruptcy; hence those shares passed to his assignees, as property in his order and disposition within the meaning of the 21st, Jac. 1, ch. 19. The point, in this case, was the *creditor voluntarily and unnecessarily allowed the debtor to remain in the sole and actual possession of the mortgaged property, and so the apparent owner of it till he failed.* The principle in this case applies to every case of the debtor's insolvency, in which a question of his *fraudulent* possession arises. It was said for the deft. the case was not within the act, because there was a mortgage or conveyance of *only a part of the ship*, leaving *the debtor testant in common with the creditor*; the court thought differently—I conceive, to exclude fraud, real or constructive, the true principle is, in all the cases, the creditor, mortgagee, or pledgee, must, when he can, in the usual course of business, do some act to *make his interest notorious* to the world.

Art 5. Con.

§ 1 *con.* A discharge of the person and present estate under the insolvent acts of Maryland, cannot be a bar to an action in the Circuit Court in Massachusetts, so as to discharge the party from the common execution; the *lex loci* governs as to the remedies. See Ogden *v.* Saunders; said acts were passed in the years 1805 and 1809.

3 Mason, 88, Hinckley *v.* Marian.

5 Pick. 146, Gibson *v.* Crehore.

§ 6. The administrator on such estate cannot apply the personal estate to redeem an estate mortgaged by the intestate, the creditor having a prior lien on the personal estate.

In the Circuit Court in R. Island, 1829, decided that the assignee stands in the place of the assignor as to a mortgage deed not recorded, and the mortgage to a third person is valid against the mortgagor's assignee created after the mortgage deed is executed.

17 Mass. R. 222-229, Martin, adm. *v.* Root & Hunt.

§ 14 *con.* A, being *insolvent*, conveyed his estate to B and C, and took their notes for the value, intending to save his estate for his family, and exclude his creditors; also, transferred to B and C, several securities for the payment of money to enable them to buy in a prior incumbrance on the estate, and promised them in writing, their said notes to him should never be collected. A, died insolvent: his administrator recovered judgment on said notes of B and C, though more than sufficient to satisfy all

claims on the estate, the surplus being for the benefit of A's family. The facts were proved by the confession of Hunt in writing, when become, also, insolvent. Held, conclusive on Root. It was the confession of facts that took place before the partnership of R and H was dissolved: see Stat. Mar. 12, 1806, ch. 90.

§ 15 *con.* B, an insolvent debtor, by bill of sale assigns in trust for all his creditors, and the trustee merely gives his note to the debtor, without any endorser or security in any agreement to perform the trust, and some of the creditors only assent verbally, to the assignment, and others not at all, the assignment is void, as against attaching creditors; and the attaching officer when sued in replevin, on the plea of property in a *stranger*, may prove the plt. claims under *a fraudulent* sale; and on a verdict for the officers, he may have a return though he do not avow for one. See 20 Johns. R. 5, 442–472. 1 Pick. R. 357–362.

Two citizens of Massachusetts contracted a debt by bond, in the State of New York. The obligee in his declaration on the bond, said, it was made to C. in New York. Held, the obligor was discharged on the insolvent act of New York, on the principle of *lex loci contractus*; it not appearing on the face of the bond it was to be performed elsewhere. The obligor's discharge was in 1806, on the insolvent act of 1801. 1 Cowen, 108–109.

Another case of discharge. A *ca. sa.* perpetually stayed; but in a certain case, the court opens the cause so as to give the plt. a chance to try the question; the judgment standing as security. A deft. so discharged, was arrested, and gave bail to the sheriff. Moved to be discharged on common bail; refused, as a *prima facie* case of fraud was made out against him by *affidavit*. What must be stated in pleading on insolvent discharge; so 1 Cowen, 356, 357; other cases of insolvent discharges; 1 Cowen, 127, 428; 3 Cowen, 147; 151 id. 159–165; 4 Cowen, 143–148: the people are not bound by an insolvent act unless named in it, nor the United States; 8 Wheat. 253; so United States *v.* Hoar; 2 Mason's R. 311, &c., &c.; 4 Cowen 345–348: the people have succeeded to the rights of the king, &c., not bound by general words, in a statute restrictive of prerogative, unless expressly named as insolvent laws, &c. 4 Cowen, 607–612: to whom the insolvent laws extend. 1 Cowen, 165. 1 Cowen, 179–180; 1 Cowen, 267, pp. 222, 223. 1 Cowen, 316–322.

§ 21. *Creditor made trustee may be two parties in an indenture of three parts*; as 2 Pick. R. 129–138, Harris & al. *v.* Sumner. Replevin for the ship John and her cargo, attached by the deft., a deputy sheriff, as the property of M. Colman, at the suit of Bradlee & al. Plt. claimed the property on a sealed deed, meant to be *tripartite*, dated Sept. 7, 1822, but in fact, written and executed Sunday 8th, by the plts. and Colman. (Two parts only were made.) This deed recited Colman had

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given them a bill of sale of the ship, and purported to be an assignment by him of all his property, as he believed, (wearing apparel and furniture, but little more, if any, than the law exempted,) that is, all the cargo of the ship, &c.; to the plts. to have, and to hold the ship, cargo, and other property, to the plts. in trust, to sell the same, and with the proceeds 1. to pay themselves $407 35 cts., the debt Colman owed them, and to pay over the residue to other creditors of Colman, who should execute the deed, in proportion to their demands. The plts. covenanted to execute the trust, and the deed, also, contained an agreement on the part of the other creditors, that the plts. after paying themselves said $407 35 cts., might pay Colman $1000 if the residue should nett these other creditors 70 per cent. of their demands, and if not, then such a proportion of $1000 as they should receive of the 70 per cent. Colman kept one deed, and the plts. the other. The property was delivered to the plts. the same Sunday. Soon after, 12 o'clock Sunday night, the deft. made the attachment. None of the creditors of the third part signed before Monday; so after the attachment. Held, the plts'. signing might be considered as a signing by a creditor of the third part. That the instrument was not necessarily void, because the property assigned to the plts. was much more than their debt; but that it was void on account of the reservation to Colman; and as this appeared in the deed itself, it was a question of law, if fraudulent or not. Held, also, the plts. were a party to a deed fraudulent on the face of it; as in Widgery *v.* Haskell; Burlington *v.* Bell. Assigning large property to a creditor, whose debt is small, may be evidence of *fraud*; but, otherwise, it does not invalidate the assignment.

3 Pick. 255—258, Wheeler *v.* Train.

§ 22. A failing debtor agreed to pay furniture in part pay of a debt; and then agreed with the creditor to have a lease of it for a year. Accordingly, the transfer and lease were made. Held, this was not conclusive evidence the sale was fraudulent, as to other creditors; and if attached as the property of the lessee, the vendor, during the year, cannot support any action. The possession in the vendor after the sale, may be conclusive evidence of fraud when *unexplained*.

4 Pick. 212—215, Bordman administrator *v.* Smith.

§ 23. *Commissioners report how far conclusive:* as where mutual demands exist in favor of, and against the creditor of an insolvent estate, are filed before the commissioners; they report a balance due to the creditor; the report is conclusive on either party who does not give notice of his dissatisfaction with it pursuant to statute 1784, ch. 2; as if the creditor alone give notice, who brought his action and became non suit; held, the administrator could not maintain an action against the creditor, on demands in favor of the estate. The matter was specially pleaded and replied, so that the facts appeared of record.

§ 24. *Assumpsit* on several promissory notes, dated after March 3, 1803, at Alexandria in the District of Columbia, made by the deft. Held, 1. An insolvent discharge of a neighbouring State, which exempts the person from imprisonment, but leaves the debtor's future acquisitions liable to execution, relates to the remedy, merely, not the contract, and is not of any force in New York: 2. Imprisonment is no part of the contract: 3. The *lex fori* governs the remedy: 4. An insolvent law does not operate as a part of the *lex loci contractus*, unless it discharges the contract. II. CH. 29. *Ar* .5. *Con.* Whittemore *v.* Adams, 2 Cowen. 626—634.

20. In equity, equality is the rule. Where a creditor has a lien on two funds to pay him, and a subsequent creditor has a lien on one of them only to this, the first creditor must not resort, but leave it to the junior creditor, if it can be done without injury to the prior creditor, or imparing his rights. But if the fund on which the junior creditor has no lien be insufficient or doubtful, or the prior creditor refuses to risk satisfying his debt out of it, equity will not take from him any part of his security, unless his debt is paid. 19 Johns. R. 486; on appeal from chancery. ART. 7. *Con.* Evertson *v* Booth, on appeal, 19 Johns. R. 486; 7 Johns, Ch. R. 174, Hawley *v* Mancius.

§ 2 *con.* The same principles held in the state courts in Pennsylvania. 1 Serg. & R. 339; 2 do. 326–336; 3 do. 22; 2 Serg. & R. 223. ART. 8. *Con.*

§ 9. See decision, Feb. 1827. A State may enact an insolvent law, that may discharge contracts made *after* the law is enacted: judges, four and three. 12 Wheat. 213 to 369; Ogden plt. in error *v.* Saunders.

In McMillan *v.* McNeil, it may be observed, when the contract was made in S. Carolina, the insolvent law in *another* State, Louisiana, had no effect in regard to it; and hence, though enacted *before* the contract was made, it could not be viewed as any part of it, or as having any influence on the minds of the parties when they made the contract.

Saunders *v.* Ogden. The action was on bills of exchange, brought in the district court of Louisiana, by Saunders of Kentucky, against Ogden of Louisiana, drawn Sept. 30, 1806, by one Jordan, at Lexington in Kentucky, on Ogden in New York city, there a citizen, and there accepted by him, and protested for non payment. Ogden's defence, a discharge under the New York insolvent law, enacted April 3, 1801; special verdict; judgment below for Saunders. Ogden brought error. When the bills were drawn and accepted, Jordan and Saunders were citizens of Kentucky.

1. As to bankrupt laws, remedy, and acts of limitations, and against usury, the same as in Sturgis *v.* Crowningshield.

2. As to insolvent laws enacted *before* the contract is made, decided as above.

3. A certificate of discharge under such law is no bar to an

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ed, because that act was enacted *after* the note was given, so in this respect unconstitutional, and the discharge was void. But 20 Johns. R. 208, where the insolvent act was in force when the contract was made the discharge under it exonerated both the person and estate of the insolvent. So decided in Ogden *v.* Saunders; 20 Johns. R. 208, Roosevelt *v.* Kellogg. If the certificate of discharge does not except *foreigner* creditors, this does not affect its validity as against creditors in New York. The insolvent must plead specially his discharge the first opportunity he has. 18 Johns. R. 336. Though the statute be unconstitutional the discharge may be pleaded to protect the *person*. 18 Johns. R. 54. So the case of Sturgis, &c.

CHAPTER XL.

INSURANCE.

Art. 1. Con.

§ 9. *What is not a contract of insurance.* The plt. wrote to the defts. inquiring on what terms they would insure his vessel. January 1 they wrote they would insure at a certain sum; on the 2d they wrote another letter retracting. The plt., before he received the last letter, put into the post office an answer to the first letter and acceded to the terms proposed. Held, they had made no contract. The plt. lived at Kennebunk, in Maine, and the defts. in Boston, and all the intercourse was by letters in the mail. The main ground of decision seems to have been that they had a right to retract till they received the plt's. answer accepting the terms. The plt. contended the contract was completed and closed when he put his letter into the post office accepting their terms.

1 Pick. R. 278, Mc Culloch *v.* the Eagle Ins. Company.

§ 10. *Commercial Code of France*, arts. 332 to 436. *Insurance* generally is the same in France as insurance is in the United States, except art. 332 particularly directs the date and form of the policy. By art. 334 the subjects of insurance are stated. *Profits* do not appear to be included. Art. 346: if the insurer fail pending the risk, the insured may demand security, or the dissolution of the contract. The insurer has the same right if the insured fail. Art. 347, &c. forbids insurance on the freight of goods still existing on board of the vessel; on the expected profits on goods, (the wages of seamen,) the sums lent on bottomry, the maritime profits on sums lent on bottomry; and, generally, this code forbids all kind of insurance that has the least resemblance to a wager. It allows only the subject actually existing and at risk to be insured. Art. 353: insurers not liable for *barra-*

try of the master. Art. 356 extends the grounds of return premiums much farther than our law does. Art. 358 makes the insurers liable in an order different from ours as it appears in Cabot *v.* Barrell. By art. 268, if concealment be proved against the insured he pays the insurer a double premium; so if the insurer conceals he pays the insured a sum double the amount of the premium agreed on; and each concealing is also punishable by the corrective police. Art. 369: the insured may abandon, if the loss or damage of the property insured amount at least to three fourths of the value. Art. 373: abandonment must be made to the insurers within six months from the day of receiving information of the loss, as to certain places named: within one year as to other places; within two years as to other places named. All seem to go on the *intelligence*. Art. 374: notice to the insurer must be in three days after receiving the information. Art. 401: general average is borne by the goods on board and by *half* of the value of the vessel and freight, rateably, according to their respective values. Art. 414, &c. &c.: referees are generally appointed by the tribunal of commerce and sworn. These are the most material differences between French and American insurance; however, a number of other differences exist.

§ 11 *con. Where one has an insurable interest. Assumpsit* on a policy, &c. dated June 1, 1822. Vessel valued at $2,000, and insured for that sum to Peters, Pond, & Co. *or whom it might concern*. Total loss alleged by perils of the sea, &c., and also averred the plt. was then the owner and continued to be interested in her till the loss. The plt. July 1, made a bill of sale of her to C, who, in writing, promised the plt. to appropriate the proceeds of the vessel to himself as security for endorsing for the plt. and to pay over the balance, if any, to D. July 19 further security was given to C, and the writing was exchanged for a deed, under seal, made for the same purposes, wherein C covenanted tha the proceeds of all the property assigned to him, including the vessel, should be applied as before mentioned. Afterwards a loss happened. Held, there was at the time of the loss a subsisting interest in the plt. protected by the policy. Was surveyed, condemned, and sold in St Domingo. Held, this survey was not evidence of the necessity of selling; if it had been, there was a total loss and nothing to abandon; but as it was, property remained in the plt., but he could not abandon by reason of his conveyance to C, hence could recover only for a partial loss. The plt. had a small interest, but insurable, and came in under words *or whom it may concern*. The plt. had an equitable interest, as mortgagor; and

2 Pick. R. 249—267, Gordon *v.* Mass. F. & M. Ins. Com.

II. Ch. 40. Art. 2.

not only a mortgagor may insure, but also a *cestui que trust.* See 7 Cowen, 564.

§ 15 *con.* If a part of a cargo be illegal it may not taint the rest of it. Insurance on a cargo a part of which was liable to condemnation, because imported from an enemy's country. The importation of the rest was authorized by license. Held, the insurance was valid as to the licensed goods. Phill. on Ins. 31, cites Pieschell *v.* Allnutt, 4 Taunt. 792; Butler *v.* Allnutt, 1 Starkie, 222; 6 Taunt. 498. *Quære*, if all be the property of the same person. Phill. on Ins. 31, 32, cited Parkin *v.* Dick, 11 East, 502; 1 Rob. 31, 329; 4 B. & A. 184.

Buchanan *v.* the Ocean Ins. Co. 6 Cowen, 318—332.

§ 21. What an insurable interest. If the owner of the cargo of his own accord repair the ship this gives him no insurable interest in her. See other cases on this subject of insurable interest or not. 6 East, 316, Hodgson *v.* Glover; 16 id. 218; 15 Mass. R. 35; 5 Rob. 251.

Art. 3. *Con.* 1 Nott & Mc Cord, 505—514.

§ 5 *con.* A domestic embargo is a peril insured against within the meaning of the policy containing the words, 'arrests, restraints, and detentions of kings, princes, or people of what nature, condition, or quality soever.' The assured may abandon on detention by such embargo, though the policy was dated the day the embargo was laid.

Art. 6. *Con.*

§ 21. *Illicit trade.* Other cases, 3 Serg. & R. 29, Faudel *v.* Phœnix Ins. Co.; do. 82, Smith *v.* Delaware Ins. Co.; 2 Johns. Cas. 481, further authorities.

Art. 7. *Con.*

§ 3 *con.* The insured always has an election to abandon or not. 2 Burr. 1211, in Hamilton *v.* Mendes; Idle *v.* Roy, Ex. Ass. Co. 3 Moore, 115. Where the assured must abandon to recover for a total loss. Bell *v.* Nixon, 1 Holt. 423: not where there is nothing to be abandoned. 2 Dall. 280, 285; 2 Johns. 150; a. 28. s. 14; 1 Binn. 47. *Aliter* if possibly something may remain to be recovered. 4 Binn. 445. In any event if no abandonment, the assured may recover according to his real loss total or partial, as the jury may find something, or nothing, left to be recovered. 15 East, 13, Mellish *v.* Andrews; Mullett *v.* Shedden, 15 East, 304; 2 Caines, 208, in Lawrence *v.* Sebor. The assured in making his abandonment must assign the true cause, and abide by that he assigns. 1 Johns. 181, 191, Suydam & al. *v.* Marine Ins. Co.; see art. 14. s. 9. As to profits, see art. 2. s. 19; art. 21. s. 25; art. 28. s. 3. No abandonment on a wagering policy. 12 East, 491; 14 id. 465; Millar, 321, 328. Art. 26. s. 9: where the crew seize the ship. Art. 21. s. 30.

§ 16. A master, who sells a cargo at auction, after abandoned to the underwriters, and buys it in at the sale to pre-

vent a loss, does not acquire an insurable interest therein: 2. If property be put at auction by the master of a ship, as agent of the owners, and bid in by him to prevent a loss, it is no sale. 'It is impossible, that a person can, at the same time, be buyer and seller; and a person, who acts as agent in selling, cannot, upon the known principles of law, become a purchaser at the sale.' In fact the master viewed this 'as a purchase for the benefit of the owners,' and to prevent a loss to them, whoever they might be. 'In so doing he did nothing more than his duty.' 'The property never passed from the owners.'

2 Mason, 369, Barker v. Mar. Ins. Com.

3 Mason, 27–90, Peele & al. *v.* Marine Ins. Com. was a libel in the admiralty side of the court on a policy of insurance. Held, an abandonment once made and accepted cannot be revoked: 2. In particular cases the assured may abandon even if the injury be less than half the value: 3. In estimating the half there is no deduction of one third, new for old, as in cases of *partial loss:* 4. That the half value which authorizes the abandonment, is half the sum which the ship, if repaired, would be worth after repairs made: 5. If when repaired not worth double the costs of repair, the owners may abandon. The deft. denied the jurisdiction of the court, being an insurance cause, and so not of admiralty jurisdiction.

§ 18 *con.* No right to abandon, though the repairs exceeded half the value. Held, 2. The insurer was entitled to have the usual deduction on the repairs of one third new for old, as the sale of the vessel was by the default of the owner. Sold on the bottomry bond given for the repairs at Lisbon.

3 Mason, 429—443, Humphreys v. Union Ins. Co.

§ 20 *con.* The doctrine of going on *the fact*, and not the intelligence has been increasing. See sec. 34; and 4 Cowen, 222—248, Dickey *v.* the New York Ins. Co. Assured may abandon if the injury exceed half the value, &c.: 2. If rightly made, a total loss cannot be turned into partial loss by after events, as by repairs, &c.: 3. But the abandonment must be before the vessel is fully repaired and able to proceed on her voyage: 4. *Material point:* if she be in fact repaired the abandonment is void, *though this be not known to the assured. It is the actual state of things*, therefore, at the time of the abandonment, and *not the state of the party's information*, that decides the validity of the abandonment. But 5. When the abandonment is made on the *information*, in order to devest it and make it void, her restoration, must be complete and perfect; and if, though in fact restored, she still remains subject to *a lien* for the expense of her repairs to more than half her value, this is not such a full and beneficial restoration as to take away the right to abandon. The judges agreed the

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principle of lien to half the value, but thought it did not apply to this case, as the *lien*, the *respondentia*, was on the goods not on the vessel insured, and she was repaired and fully restored, in fact, before the offer to abandon. Savage, C. J., however, seems to think the vessel was liable to the owner of the goods, so a *lien* on her; but he finally decided for a *partial* loss, on the decision of Story, J. holding where the assured elects to repair, as in this case, he cannot abandon; but his counsel denied he did so elect, as the repairs were made at the Isle of France by the master's direction, and without the assured's knowledge; but whether the master had them made on account of the assured or the underwriters seems to have been but little attended to.

The main ground the same, 5 Cowen, 63—67, Depau *v.* the Ocean Ins. Co.

How reasonable notice must be given of abandonment; 10 John. 273; 1 D. & E. 608; 6 Cranch, 273. Must be in season, 9 East, 283; 6 Cran. 280—284; 4 Binn. 445—449; 3 John. Cases, 182.

3 Pick. R. 70-74, Archibald *v.* Mercantile Ins. Com.

§ 23 *con. Illicit trade.* The insurance was on goods, the produce of the United States, on board of an American vessel, 'at and from Boston, to St Pierre's Mequilon, at and from thence to Boston, with liberty to proceed to St Johns, Newfoundland.' The assured went to St Pierre's, where he sold part of the goods, and with the residue he proceeded to St Johns, not knowing such voyage was prohibited. There the property was seised and condemned, because not brought direct from the United States. Held, the loss was not covered by the policy, the terms being general, and it not being known to the insurer, that an illicit voyage was intended by the assured. The insurer must understand he insures against such trade. Several cases, Phill. on Ins. ch. 13. s. 16; besides those cited in this abridgment.

3 Pick. R. 46--48.

§ 24 *con.* To constitute a stranding or bilging, there must be a breach in the vessel; not enough she by straining, have her seams opened so as to leak and wet the cargo. See a. 21, s. 23.

§ 30 *con.* Insurance as to time, further authorities; 3 Serg. & R. 25, Peters *v.* Phœnix Ins. Co; 5 Binns. 545.

Saltus *v.* Unit. Ins. Com. 15 Johns. 323.

§ 33 *con.* But where the danger of capture is certain, it is an arrest and restraint within the terms of the policy; as where a vessel is in port, and a number of enemies' armed vessels are near by, constantly watching the port. See 5 Binn. 403; ch. 224, a. 13, s. 2; a. 21, s. 23.

§ 34 *con.* Church *v.* Bedient, 1 Caine's Cases, 21, above; Hallett *v.* Peyton, 1 Caine's Cases, 28; Penney & al. *v.* the

N. York Ins. Co., 3 Caines, 155--158; Schieffelin *v.* N. Y. Ins. Co., 9 Johns. 221; and Adams *v.* Delaware Ins. Co., 3 Binns. 287; 4 Cranch, 370. The cases seem to proceed on the *fact;* on the whole, the late cases seem best to support the said decisions in Bainbridge *v.* Neilson, & Marshall *v.* the Del. Ins. Co.; also Muir & Boyd *v.* Union Ins. Co; 1 Caines 48-54, & 4 Dall. 446, Dutilgh *v.* Gatliff; see s. 20, this article; 5 Taunt. 711--716, 824; 2 East, 385; 11 Johns. 282, total loss by capture.

§ 50. Abandonment is not justified by fear, unless for a just cause, and well founded, such as is caused by the *vis major*; as for example, the fear of being made a slave, or prisoner, or of perishing in extremity, when defence is impossible; but not threats without legal authority to execute them; nor the desertion of the crew, if another can be procured; no excuse they cannot be fed, for the insurers are compellable to pay the expense; though the act of Congress forbids American seamen to navigate vessels employed in the slave trade; yet it can be no good excuse to fear condemnation in *foreign* courts, since the admiralty of one nation has no right to enforce the laws of another. Hence fear is no cause of abandonment. The act of Congress punishes only those who *voluntarily* engage in such slave vessels. When Great Britain and Spain were at peace, a British captured a Spanish ship, and then released her, because suspicion was excited as to her neutrality, by a nation thus at peace, and on this account the capture was made. Held, this was not sufficient ground for an abandonment, it not having been made till after the restoration, and this known to the assured, and there is an item in the policy, there should be no abandonment till condemnation.

1 Nott. & M' Cord, 155-170, Missonier *v.* Un. Ins. Com.

§ 51. *Form of an abandonment.* Need not be in any particular form, Bell *v.* Beveridge, 1 Binn. 52, n.; 4 Dall. 277; nor in writing, generally; 3 Yeates, 378; Read *v.* Bonham, 3 Brod. & Bings. 147; must be direct and absolute, 1 Johns. 181--191; Suydam's case. The assured, in making his abandonment, must assign the true cause. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a subsequent event, without a new abandonment. There is no particular form of acceptance of the abandonment. It is proved by any words or actions that satisfy a jury the underwriter accepted. Griswold *v.* New York Ins. Co., 204-214. So *e converso*, and words or acts will show he did not accept, which, in the jury's opinion, evinces he did not. 3 Johns 320—330.

§ 52. The same may be said of the evidence of the revocation of abandonment, as if, after the assured has abandon-

II. Ch. 40. Art. 7. Con.

ed the ship, &c. he, *without cause*, exercise any act of ownership over her, or purchase her for his account and benefit, he waives the abandonment, and can recover only for a partial loss. Abbott *v.* Sebor, 3 Johns. Cases 39; Saidler *v.* Church, id. 10 Johns. 177; 12 do. 25. Not a waiver if the property after abandoned, arrives in safety, and is tendered to the insurer, who refuses to accept it; a sale by the assured, for the benefit of the insurer, is no waiver. 3 Johns. case, 293; Caines, 292.

Art. 8. Con.

§ 8. The adjustment may be *conditional*. Gammon *v.* Beverley; 1 Moore, 563; Taunt. 119.

An adjustment, made and signed, is not to be opened but for fraud or a mistake from facts not known; 1 Caines, 32--36, Dow *v.* Smith; not for a mistake of *law*; 2 Marsh, on Ins. 540--589, Bilbie *v.* Lumley & al.; 2 East. 469--472; but Elting & al. *v.* Scott & al. 2 Johns. 157--165; whether an insurer, who has paid a loss under a full knowledge of the facts, can recover back the money on the ground of a mistake of the *law, dubitatur*, and 12 East, 38.

§ 10 *con.* 12 East. 488; 13 do. 323; 4 Taunt. 803; 3 Cowen, 210--220, Whitney *v.* the American Ins. Co. *Assumpsit* on a policy of insurance, cargo valued at $14,000. This was the outward cargo, and it turned so badly that all of it produced a much less return cargo. This was lost by perils that were insured against. Held, that assured was entitled to recover the 14,000; but otherwise if only a part of the outward cargo had been vested in the return cargo.

Adjustment on a policy, a partial loss, &c. Where any of the ship's materials are sacrificed, one *third new for old* is to be deducted; thus where part of the *old sheathing (copper)* was taken off and replaced by *new copper sheathing*, you must first deduct the value of the old copper from the value of the new, then deduct one third new for old from the balance, and the remainder forms the measure of damages; the old materials belong to the assured. This calculation in N. York, has no regard to the English practice. Byrnes *v.* the National Ins. Co., 1 Cowen, 265—278.

Art. 9. Con.

Bedford Com. Ins. Com. *v.* Parker & al.

§ 12. *Assumpsit* to recover a proportion of expenses incurred by the plts. in getting off and securing the ship Phœnix and her cargo, belonging to the defts. the ship having been stranded. The plts. were underwriters on the ship, and expended $2600 for so saving her and 155 tons of iron, part of her cargo. Held, 1. This iron was liable to contribute in general average. The court said 'when a vessel is accidently stranded in the course of her voyage, and by labor and expense is set afloat and completes her voyage, with the cargo on board, the expense bestowed for this object, as it produces benefit to

all, so it shall be a charge upon all, according to the rules of apportioning general average:' 2. The 40 tons of iron previously taken out and saved at the defts'. expense, was not liable: 3. The valuation of the vessel in the policy was taken deducting $1750, she was injured by the stranding: said to be a new case. 2 Pick. 111.

4 Barn. & Cres. 736.

In the voyage, the ship was by tempestuous weather forced to take shelter in a harbor, and in entering it, struck on an anchor, and being brought to her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbor, where she took the ground and remained fast there for half an hour, held this was a stranding. What is average, &c. 1 East. 228.

Bondrett *v.* Hentigg, 1 Holt. 149.

How far on stranding are the insurers liable? In case of stranding or shipwreck, the insurers on ship and goods are respectively liable for the damage done to the subject itself, by the disaster: 2. By plunder or other inevitable casualty on shore: 3. for all the expense incurred in order to save the goods or to get the ship afloat. See the clause in the policy authorizing the assured to sue, labor, &c., stated in ch. 21, & 3 Caines 190--196; Hastis *v.* de Peysteys, items in losses, &c. Rule 1. Imerigon, p. 612--622; Dig. 14, 2, 2, 1; 3 Wash. Car. R. 293; Code de Com. a. 400, a. 403; ch. 103, a. 4, s. 19; Abbott by Story, id. 1829, pp. 342--362; many cases cited, and different decisions; ch. 57, a. 2, s. 5.

§ 31. *Pothier.* According to him, his treatise on maritime contracts, Ed. 1821, in general, or as he calls it, gross and common average; (contribution) these things are essential, and must be shown, in constituting and calculating such average and contribution.

1. There must be shown a sufficient cause for the jettison, that is, for throwing a part of the goods overboard, or for the ransom from pirates or enemies, in order to save the residue of the goods and the ship.

2. Such jettison, or such ransom, must be on consultation of the persons on board, except boys and fresh sailors.

3. Such jettison, or such ransom, must be with the design and deliberate purpose, of preserving the said residue and the ship.

4. Such jettison, or such ransom, must be the real cause of preserving the said residue and ship during the existing storm, chase of pirates, or enemies, or other pending danger.

5. All these things being effected, a right to contribution and common average, vests, and is complete, and has contribution of the parts saved in an after peril in the same navigation.

6. In calculating such average and contribution, all the

II. Ch. 40. *Art.* 9. *Con.* property in danger, lost or preserved, including the freight due, must be included in the account except provisions for the consumption of the persons on board, and except sailors' clothes and wages, in cases of jettison, but in cases of ransom their wages are not excepted.

7. The true value of all the property liable to contribute must be found at the port of discharge, whether that of the destination or that of necessity.

8. The net value must be taken, that is, freight and charges due on the property, so liable, must be deducted from the true value, as in the 7th head above.

9. The liability of the owner of the goods, to contribute, is found in his contract of charterparty, and, so the master impliedly to indemnify him.

10. If the goods so thrown overboard be recovered, the owner of them is allowed only his actual loss.

11. There is no contribution when the master is liable for the loss.

12. Goods withdrawn from the ship before the jettison do not contribute.

13. If damage be done to a part with a view directly to preserve the residue, there is contribution; observing the four first rules above stated.

14. If monies be paid, or allowances made, on the same four rules, to seamen, &c. with the express intention to save property in danger, there may be contribution according to circumstances. See Pothier's calculations, pp. 75—76.

Art. 10. *Con.* § 9. So if A hire a vessel of B for six months, rendering to him half of her earnings, and sails in her himself as master, he is so far owner of her that he cannot be charged with barratry: 16 Mass. R. 336--341; and such a hiring may be by parol; the master to victual and man her, &c.; 3 Taunt. 508, 6 id. 875; 2 Campb. 620; 11 Johns. 40.

§ 12. Insurers liable for the frauds and crimes of the mariners; Driscol *v.* Passmore, a. 12, s. 42; 1 Taunt. 227, Toulmin *v.* Anderson. Four mariners conspired with some prisoners of war, and got command of the vessel, and run her ashore, and adjudged barratry. See a. 12, s. 9.

Cases not barratry. Soares *v.* Thornton, 1 Moore, 373; Hobbs *v.* Hannam, 3 Campb. 93.

§ 13. Insurers not liable for ordinary losses, such as every vessel is liable to. 1 Caines, 217--248; Barnewall *v.* Church, p. 234. This principle is stated by Thompson, J. See concealment, not sea worthy, &c. in other places.

Art. 12. *Con.* § 21 *con.* No deviation if a vessel proceed to three or more ports to unload, &c. if, according to the course of trade and

navigation at the places. 1 Taunt. 450; 3 id. 419: and if no increase of risk, 5 Pick. 51; 4 Barn. & Cres. 538.

§ 34 *con.* No deviation to sail unprepared from a port to avoid a seisure in it. O'Rielly *v.* Gorne, 4 Camp. 249, & Peake, 212; Green *v.* Elinslee, 12 East. 653 Intention to deviate is no deviation: 2 Cains, 129--133; Steenback *v.* Col. Ins. Co., & 2 Caines, 172; 11 Johns. 241; 14 Johns, 46; 3 Cranch, 357--398, & see 2 Taunt. 428; 1 Campb. 263; 3 Wheat, 166.

§ 44. *Assumpsit* on a policy of insurance. Question of deviation in a long voyage beyond the Cape of Good Hope. Held, 1. Under a policy, granting liberty to touch at a port, the ship there may take in or discharge cargo, without its being considered to be a *deviation*, provided that no delay, nor change of the risk insured against, be occasioned thereby, and provided the purpose for which the liberty was granted, be kept in view. The insurance was on the ship Marmion and cargo, from Boston, to any port or ports beyond the Cape of Good Hope, one or more times to the same port, for the purpose of selling the outward, and procuring a return cargo, and at, and from thence to port of final discharge in Europe, or the United States, (not both,) with liberty to stop at the usual places of refreshment, and to trade there. She sailed first to Cochin China, to purchase a cargo of sugar, but her outward cargo consisting of gold coin only, with which she could not trade. She sailed to Manilla to sell her gold for silver; having done which, she returned to Cochin China, and purchased about one eighth of a return cargo; but finding she could not complete her lading there, she sailed thence to Batavia to make up her cargo; she found that sugar was scarce and dear in that port, but that she might procure it at an out port, and have it brought to Batavia in lighters, at an expense of fifty cents a picul, or she might proceed to Samarang, and there complete her lading. But by a law of Java, she could not proceed to Samarang without discharging her sugar brought from Cochin China. She sold that sugar without any view to profit, merely that she might be enabled to go to Samarang to procure a cargo. She accordingly sailed to Samarang, and procured a cargo, and on her passage to her port of discharge in Europe, she was lost.

4 Pick. 471—496, Thorndike *v.* Bordman.

Held, that neither the going to Manilla, and returning to Cochin China, nor the transaction at the island of Java, constituted a deviation or avoided the policy; and that the policy attached, if not in the whole, at least in seven eights of the cargo laden at Samarang. Held, also, that within the terms of the policy, the ship might go to a new place of trade beyond the Cape of Good Hope, there being no express restriction to places of customary trade, and no evidence of usage to control the

II. Ch. 40. Art. 12. Con.

general import of the terms. Putnam J. dissented. It does not appear the defts. counsel much insisted on any *geographical* deviation; but strenuously urged a deviation from the *purpose* of the voyage insured, which was, they said, singly and solely '*for the purpose of selling the outward and procuring a return cargo*:' that from this *purpose* there was a deviation at Batavia, in selling and unlading the 1000 piculs of sugar taken in as return cargo, at Cochin China. This was also the opinion of Judge Putnam, who thought this selling and unlading lengthened the Marmion's stay at Batavia, and so increased the risk. Whether so delayed or not, seems to be rather a question of fact. Parker, C. J., and a majority of the court thought there was no such increase of delay and risk, and no deviation from the purpose of the voyage insured, and so the reporter expressly states the decision. The instructions to the jury were in substance as above stated in the beginning of the case. The jury found a verdict for the plt. See Stitt *v.* Wardel, s. 15, and a. 21, s. 13; Lavabre *v.* Watson, s. 19; Stocker *v.* Harris, s. 24; Grant *v.* Paxton, 1 Taunt. 463; Same *v.* Delacour, id. 466; Beatson *v.* Haworth, this ch. a. 12, s. 17; Raine *v.* Bell, a. 24, s. 20; Solly *v.* Whitmore, 5 B. and A. 45; Rucker *v.* Allnutt, 15 East. 278; Sheriff *v.* Potts, 5 Esp. R. 96; Kane *v.* Columbian Ins. Com. s. 30, Phillips, 200; Kettle *v.* Wiggin & al. 335; this art.; Maryland Ins. Com. *v.* Le Roy & al., s. 35, this art., Hughes *v.* Union Ins. Com., 3 Wheat. 159.

Art. 14. Con.

§ 9. Add on this subject 10 East. 539–540, Maury *v.* Shedden; 3 Starkie, 573.

Art. 15. Con. 17 Mass. R. 613—615, Gardner *v.* Bedford.

§ 12. Action of *assumpsit* on a policy of insurance made by the defts., Nov. 15, 1811, whereby they insured for 'the plt. himself, and others concerned,' $12,000 on the cargo of the ship Rose, at, and from Canton to Nantucket. Several counts in each, averred the plt., with one Jedidiah Fitch and one James Carry, were the owners of the cargo insured, and that the policy was made for the benefit of these three persons. The plt's. interest was fully insured in a prior policy. Held, he could not maintain an action on the policy in his own name, for the benefit of Fitch and Carry. Each owned one sixteenth of the cargo. The plt. averred a joint interest in the three, but proved none, as his own part had been before insured. Costs for the defts.

Art. 16. Con. 17 Mass. R. 471.

§ 18. The underwriters on cargo are liable whenever the assured are compelled to pay an increased freight, as the unavoidable consequence of the perils insured against; so is the marginal note; but in the case there was no *extra* freight paid for the freight of the Jason, the original ship, lost at the Isle of France, would from thence to Amsterdam, have been $4,500, and the Dutch ship was hired for less, to carry the cargo the same passage; but Wild, J., in giving the opinion of the court said,

'if, however, the Dutch ship had cost more, the underwriters would not have been liable' for the extra expense. It will be observed, that this extra expense or freight, was no part of the case, as it was. Dodge, executor, *v.* the Union Mar. Ins. Com.: but 4 Johns, Ch. R. 218, Searle *v.* Scovill: the insurers are liable for such extra freight: other cases as to insurance on freight; 2 Brod. & Bing. 320; 13 East, 323; 1 Maule. & S. 313; 16 East, 218. II. Ch. 40. *Art.* 16. *Con.*

§ 22 *con.* 12 Johns, R. 214; 19 do. 137; 2 Cowen, 56–118, New York Fireman Ins. Com. *v.* D'Wolf, same principle, property not changed till delivered by the neutral to the enemy of the captor: see the case of the Commercen, ch. 33, a. 3, s. 4; distinction between provisions of the enemy's or neutral growth, carried by a neutral to the captor's enemy. Judgment of the supreme court for D'Wolf, the assured, affirmed in the court of errors: sufficient, 1. he concealed from the assurers no fact that did increase the risk: 2. The property remained his when captured by a Venezuelan vessel. Warranted *American* property; was flour and pork, *American* growth, shipped for the account and risk of D'Wolf, an *American* citizen, first for Havana, to be sold there on his account, and if not sold there, then to be carried to Laguira or Porto Cabello, Spanish possessions. Sailed to the Havana, and thence for Laguira, near which place was captured by a Venezuelan privateer, and cargo condemned as prize, &c., on the ground it was Spanish property. Levy, the neutral Dane, purchased the cargo, and was to pay D'Wolf for it when delivered at Havana, Laguira, or Porto Cabello. D'Wolf was ignorant the cargo was destined for the use of the Spanish government. Levy, when he bargained for the cargo was in New York, but acted as Spanish army contractor. As to the change of property, the chancellor said, this case was exactly like that of Ludlow *v.* Bowne, and Eddy, this section: 3. Decided there was no fraud in the case to subject the cargo to condemnation. It was D'Wolf's cargo and *neutral*, in the war then existing between Spain and Venezuela, and destined to ports then in the possession of Spain, and for her use the flour and pork were not contrabands of war, and there was no blockade. D'Wolf as a *neutral*, had a right to carry on this commerce to the country of of the enemy of the captor. A government at war may, like its subjects, contract to buy the property of neutrals, when the articles shall be brought into its own dominions, if the property be *bona fide* neutral, and not enemy's in disguise. Art. 17. *Con.*

§ 25. If a vessel be destined for a *billigerent* port, but clears out for a *neutral* one, this does not avoid the policy of insurance, where the risk is not increased. This case rests on a material fact in cases of insurance, as to which, a material question often arises, that is, the increase or not, of the risks insured against. 2 M'Cord, 503.

II. Ch. 40. Art. 19. Con.

§ 1 *Con.* If the agent in procuring the insurance, misrepresent the time of the vessel's sailing, the policy is void, especially if the difference of sailing is material to the risk. 3 Mason. 96, Baxter *v.* the New England Ins. Company.

4 Pick 439—443, Rice & al. administrators *v.* New England Mar. Ins. Company.

It is not a misrepresentation where a master of a vessel writes to his agent that he 'shall sail the 12th, &c.,' and the agent, in effecting insurance for him represents that he 'expected to sail about the 12th;' for the first expression denoted only expectation.

12 Wheat. 408-419, General Interest Ins. Com. *v.* Ruggles.

§ 5 *con.* $3,000 dollars on the sloop Harriet, &c., *lost or not lost*, at, and from Newport, Rhode Island, to, at, and from, all ports and places to which she may proceed in the United States, during the term of six months, beginning Jan. 12, 1824; policy dated Feb. 9, 1824; lost Jan. 19, 1824, on Cape Hatteras. The master omitted to inform his owner of the loss, with the fraudulent intent, that he might innocently get insurance. The owner so procured it, and recovered. Plt. cited Park. 209–320; 1. D. & E. 12; 1 Maul. & Selw. 35; 9 Johns. 32; Phill. Ins. 82–97; said the master was not the agent of the owner as *to insurance*, nor bound him as to it; hence his misconduct could not; that all parties to the contract acted in good faith, and *when* the master misconducted, his agency in navigating the vessel had ceased by the loss of her totally; but if agent to any, he was agent to the underwriters, the risk commencing Jan. 12, 1824, before the loss, and so before the misconduct of the master, as his agency was transferred from the owner to the underwriters, by the *abandonment*. As the abandonment was *after* the misconduct, the transfer of the agency was too late, unless it related back to the total loss, and this, probably, was the court's idea, though it said, 'by the abandonment, the underwriters were substituted in the place of the assured, and the master, although the agent of the owner *till the loss occurred*, became, *upon the abandonment*, the agent of the underwriters:' cited Fitzherbert *v.* Mather; above, this section, Stuart *v.* Dunlop, 4 Barn. Parl. Cas. and Park. 320, Andrews, &c., *v.* Marine Ins. Com.; 19 Johns. 32–35; Gladstone *v.* King; 1 Maule. & Selw. 35; considered a new question.

Art. 20. Con.

§ 14. *Return premiums.* So risks are divisable as to property or profits at hazard; as if A supposes honestly he shall have $10,000 cargo, and pays a premium for *expected profits* on that amount, and for some sufficient cause he has but $5000 cargo, he recovers back half his premium.

Eayre *v.* Glover, 1 East, 218.

If the goods arrive safe as to the perils insured against, so the insurers are liable to no loss, but they arrive not safe as to other perils not insured against, there is a return premium where stipulated, if the goods arrive safe. Here they arrived, but were seized. Dalgleish *v.* Brooke, 15 East, 295; this case is not affected.

By Kellner *v.* Le Mesurier, 4 East 396–406. In this case the ship did not arrive *at the ultimate port of destination.* See 19, 2 Marsh, 569 ; 4 Dall. 463. I. Ch. 49. *Art.* 20. *Con.*

§ 24 *con.* In England held, malt, pease, and beans, are included in the description of corn. Man. 226. But saltpetre is not salt. Journu *v.* Bourdieu, Park. 113. But skins include deer skins. Bakewell *v.* United Ins. Co. 2 Johns. Cas. 246.

A cargo of corn, arrived at the port of delivery so damaged in the voyage as to be worth less than the freight. Yet the ship not having been *stranded*, and there being no *general average.* ; held, the insurer was not liable. See art. 21 s. 23 ; Park 114 ; 12 Johns 107–738. The loss of the ship is not a total loss of the wheat, &c. if another ship can be had. 2 Camp. 626. *Aliter* if no other ship can be had. Marsh on Ins. 143, Mason *v.* Skurry.

§ 31. Other cases of *return premium*—8 Johns. 491 ; 2 Binn. 229 ; 2 Campb. 546 ; 1 East 335 ; 1 Maul. & S. 39 ; 3 Cran. 385 : 3 John. Cas. 150–269 ; 8 John. 383 ; 17 id. 23 ; 11 East. 428 ; 3 Taunt. 299 ; 9 D. E. 192–195 : 16 East 214.

§ 9. Horses were insured from Liverpool to N. York, one received his death wound in a storm in the voyage, and died a few days after landed. Held the assured ' were entitled to recover the full value of the horse.' The death was only evidence of the extent of the loss. See a. 7, s. 30 Dorr's Cas. See s. 35. Art. 21. *Con.* Coit *v.* Smith, 3 Johns. Cas. 16.

§ 13 *con.* Policy on horses, warranty free from mortality and jettison. In the voyage, in consequence of the agitation of the ship in a storm, the horses broke down the partitions by which they were separated, and by their kicking bruised and wounded each other so much that they all died. Held on a special verdict that this was a loss by the perils of the sea, and the assured entitled to recover : 2. Nor was he bound by a usage at Lloyd's Coffee House, it not being found he was in the habit of effecting policies there. Sundry cases Phill. on Ins. ch. 13. 3 Barn. & Cres. 793, 796, Gabay & al. *v.* Lloyd.

But the master being obliged to sell porter and claret in the West Indies at a loss, to prevent their being spoiled by the heat, is not a loss within the policy. Gould *v.* Shaw, 1 Johns. Cases, 293 ; 2 do. 442.

§ 23 *con.* As to total loss. Marsh. 144 ; 15 East, 559 ; 2 Marsh. 432 ; 1 Holt 349 ; 7 Taunt. 154 ; 2 M. & S. 371.

§ 35. The same as to a life at sea. Patterson *v.* Black, 2 Marsh 678 ; 416–417, cases of insuring lives, &c.

§ 39. *Sundry matters.* *Assumpsit* on a valued policy. Held, 1. Live animals and the freight of them are not protected by the general terms upon ' cargo and freight,' but are 4 Pick. 429—438, Wolcot & al. *v.* Eagle Ins. Company.

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the subjects of particular insurance: 2. Nor are goods on deck under those general terms: 3. Nor is provender for such animals: 4. One may insure under the name of freight, the safe transportation of his own goods in his own vessel: 5. Coin and the freight of it, put on board by the owner of the ship, to be invested by the master in merchandise, are protected by a policy upon cargo and freight: 6. If by mistake or design, the assured under a valued policy, puts at risk only a part of the goods and freight to which he intended the valuation should apply, in case of loss, he can recover only such proportion of the valuation, as the goods and freight, at risk, bore to the whole subject matter of the valuation: 7. Where insurance under a valued policy is made for a term of time on any voyage within the term, the same evidence of interest at risk is to be required, as if the insurance were on that single voyage.

12 Wheat. 383-408, Col. Ins. Com. v. Catlett in Error.

§ 40. *Insurance out and home*, &c. A policy for $10,000 on a voyage 'at and from Alexandria to St Thomas, and other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandize, laden, or to be laden, on board the ship, &c. beginning the adventure on the said goods and merchandize from the lading at Alexandria, continuing the same until said goods and merchandize shall be landed at said St Thomas, &c. and the United States, aforesaid,' is an insurance on every successive cargo taken on board in the course of the voyage, out and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo: 2. It covers the $10,000, the entire voyage, so long as the assured has that amount on board, not regarding a part of the original cargo was safely landed at an intermediate port before the loss: 3. Where the cargo, in the outward voyage, is permanently separated from the ship by the total loss thereof, and the cargo perishable in its nature, though not injured to half its value, it becomes necessary to sell it, the further prosecution of the voyage with the same ship or cargo, being impracticable; the loss is technically total, on account of breaking up of the voyage: 4. A *bona fide* stay at a port according to usage, to sell, is no deviation: 5. Where different ports are to be visited for selling the cargo, the owner may limit the price at which the master may sell to a reasonable extent: 6. Freight is not a charge upon salvage of cargo in the hands of the underwriters, whether the assured is owner of the ship or not; as to freight justice Johnson dissented, and cited sundry authorities.

§ 41. *Usage explains*, &c. A vessel was insured from Amsterdam to Charleston; and the usage was proved to be

for vessels to take part of their cargo at Amsterdam, and the rest at the Texel, and the vessel sailed from Amsterdam, but, while lying in the Texel, waiting for a cargo, she was injured by bad weather. Held, the insurers were liable though they refused to insure *at and from Amsterdam*. See Noble *v.* Kennoway, a. 21, s. 10, and ch. 40, a. 24, s. 12—18. See Usage. II. Ch. 40. *Art.* 21. *Con.*

§ 16 *con. Seaworthy—special case as to.* *Assumpsit* on a policy of insurance subscribed by the deft's. September 8, 1819, in New York; there was this special clause in it—'and lastly it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscriptions on this policy.' The jury found the vessel was seaworthy when she commenced the risk, and when she sailed on the voyage insured. Held that proof by a regular survey of unsoundness at any subsequent period of the voyage discharged the underwriters: 2. An exemplification of the condemnation of the vessel in a foreign court of vice admiralty reciting the certificate of surveyors that the vessel was unworthy of being repaired, and unsafe and unfit ever to go to sea again, and produced in evidence by the insured, to prove the loss, is 'a regular survey' in the language of the above clause: 3. But the survey must correspond with the contract, and if the vessel be declared unseaworthy for any additional cause, besides being 'unsound and rotten' it is not conclusive evidence of unseaworthiness. *Certiorari* awarded. Art. 22. *Con.* 7 Wheat. 581–615, Dorr *v.* the Pacific Ins. Com. in error.

§ 17. 10 Wheat. 411--420, Janney *v.* Columbia Ins Com., a similar case; 20 Johns. R. 328.

§ 18. Seaworthiness is to be presumed, but if a ship in one or two days after she leaves port becomes leaky and founders at sea without any adequate cause, then it is incumbent on the assured, to show she was seaworthy when she sailed. Miller *v.* South Carolina Ins. Com., 2 M'Cord, 336; 8 John. 162; 20 id. 328.

§ 19. *Assumpsit* on a policy whether a ship be so much out of trim as to be unseaworthy, is a jury question: 2. Where a ship is out of trim during part of the risk, but before a loss happens is put into proper trim, the insurer is liable. No inception of the voyage, and the insured may prove the real destination of his ship by his orders, though not shown to the underwriters. Several cases cited. 5 Pick. 51–53, Chase *v.* the Eag. Ins. Com. 5 Pick. 89--96. Houston *v.* N. E. Ins. Co.

§ 17 *con.* 1 Hop. Ch. R. 283; *Fire*, insurance against, is not a charge on the mortgaged premises unless specially agreed, but taxes are, when paid by the mortgagee. Art. 26. *Con.*

Case of *fire* in equity; who is general agent or not. The

II. Ch. 40. Art. 26. Con.

defts. and Company incorporated in New York to insure against loss, &c. by *fire*, appointed A their surveyor in *Savannah*, to survey and return descriptions of property offered for insurance, and to state the terms or probable rates of insurance to applicants, and to receive from those willing to pay premiums, proposals, and to send the same to the defts. *who reserved to themselves the right of deliberating and deciding on the applications*, and to accept or reject them, in their discretion; and their printed proposals stated that no insurance should be considered as made or binding, till the premium was paid, &c. Held, A was not the general agent of the defts. for effecting insurance in Savannah, nor were they bound by his agreement for that purpose, or by his receipts of the premium, so as to make them liable for a loss happening before they received the premium, and before they so decided. This was a just decision if the said reservation to decide, was made known to the applicants, otherwise, A's agency was a deception, as they had a right to believe themselves secure after they had paid the premiums to him on his agreements. And it may here be observed, that some insurers against fire have so many provisions, exceptions, and reservations in their policies, all in their own favor, that they are not much better than honorary engagements.

Perkins v. the Wash. Ins. Com. 6 Johns. Ch. R. 485.

See extended special pleadings in a case of insurance, ch. 181, a. 1, s. 2, as to demurrers.

6 Cowen, 635–642.

5 Pick. 34--38, Park v. Gen. Int. Ins. Com.

Insurance against fire; important case of contribution, &c. among underwriters, and making rateable payments according to certain words in the policies. This was insurance against *fire* $10,000 on goods in the plts'. store, and by them held in trust for the term of a year. The plts. represented they were in the habit of receiving goods for sale and making advances on them, and that they wished to obtain insurance on such goods to secure themselves against loss by fire, as the consignors might not be able to repay the advances. Construing the policy and representation together, it was held that the policy attached to goods the plts. received as consignees; but covered only their interests in them, and not that of the consignors. The court said, 'we can discern nothing in the representation made, which manifests the intention of securing any interest but their own.' The plts. were commission merchants; nor did the facts agreed show any intention to insure the interest of the consignors, or to charge them with any premium paid by the plts. for them.

Art. 28. Con.

§ 19. Acts of agents may, by express words, be insured against, when their misconduct is not owing to the fault of the assured himself; that against their negligence and frauds as

well as against barratry, without such express clause, the insurers are not liable for the frauds, mistakes, or negligence of masters or agents, (not barratry.) 1 Emer. 604, ch. 12, s. 33; Bell *v.* Carstairs, 14 East. 382; 1 Johns. Cases, 346; 2 N. R. 336–339, Hodgson *v.* Malcolm, see a. 10, s. 10. II. Ch. 40. *Art.* 28. *Con.*

Ship is blown up by a seaman's carelessness; insurers discharged. As where a vessel was laden in part with powder, and one of the men negligently placed a candle near the binnacle, which took fire, and by this means the fire was communicated to the powder, &c. Grim *v.* Phœnix Ins. Com., 13 Johns. 451; so resisting search, a. 17, s. 18, but search may be resisted in some cases, see ch. 227, s. 84; ch. 40, a 17, s. 3

In two cases the insurers have been held liable, though the loss has happened by the negligence, *remotely*, of the master or crew. 2 B. & A. 73, Bush *v.* Boyal Exchange Ass. Com.; Walker *v.* Maitland, 5 B. & A. 171; 1 John. 335–339; negligence considered.

Phill. on Ins. 230, says the above (and other cases he cites) prove the principle &c. 'that the insurers are not answerable for losses arising directly or indirectly from the fault or gross negligence, ignorance, or unskilfulness of the agents of the assured,' and refers to after cases also. If a loss happens by the vessels being unseaworthy, the insurer is not liable, and the same reasons exist if it happens by the fraud, negligence, or misconduct of the master or crew, appointed by the assured. When the loss happens by the *ordinary* negligence or ignorance of the assured, or of any of those he employs, why should the assured make the insurer pay or bear the loss? The common law principle is, when a loss happens, and one of two parties must bear it, he must bear it by whose negligence of any sort, want of skill, or good conduct the business requires, the loss happens.

CHAPTER XLI.

INTEREST.

§ 4 *con.* A gave a bond to pay four per cent. interest on certain legacies till the legatees come of age, and as each came of age to pay him his part of the principal. Held, they were entitled to seven per cent., the interest in South Carolina, from the time the principal became due, that is, from each arriving to twentyone years of age: 2. Where a bond is made in a foreign country, payable there, the interest is the legal interest of that country. ART. 1. *Con.* 1 Nott & Mc Cord, 67–69.

II. Ch. 41. *Art.* 1. *Con.*

A bond is given to pay a sum of money in three equal annual payments, and interest on the whole annually. Held, the obligee is entitled to interest on the aggregate amount of principal and interest of each instalment as it becomes due, and this is not usury. Justice Johnson dissented. Reasons at large on both sides. For the interest cited 4 D. & E. 613; 2 Mass. R. 568; Taylor's R. 231; Ord on Usury, 36; 1 W. Bl. 267; 1 P. Wms. 653; 2 Vern. 135; 1 Eq. Ca. Abr. 287; 2 H. Bl. 144. Cited against it, 1 Johns. Ch. R. 13; 1 Salk. 449; 3 Hen. & M. 89, 116; 1 Binn. 165.

1 Nott & Mc Cord, 38 to 52, Gibbs v. Chisolm.

When several payments are made on a bond, &c. on interest, the manner of computing is as in Massachusetts.

3 Cowen, 87—89.

Interest according to that of the place where the contract is made. *Aliter*, when it is payable in another place. 17 Johns. R. 511; 7 Johns. Ch. R. 69. 3 Cowen, 88, 89; several cases respecting interest. The same principles, 1 Johns. Ch. R. 17, 18; 2 id. 200; p. 88, and references to several Massachusetts cases on the same principles, (cited in this chapter): so in Virginia, Kentucky, North and South Carolina, and Maryland: nearly the same in Connecticut: so the rule in New Jersey and Pennsylvania is stated. Interest in foreign countries, 17 Johns. R. 511, computed as interest is where the contract is made; but, 7 Johns. Ch. R. 69, otherwise if payable elsewhere, then by the rate of interest where made payable.

It has often truly been observed there is scarcely any subject on which there are so many nice unsettled questions as on the subject of interest, and such have evidently increased with the numerous decisions made of late years, in relation to them in England, and especially in the numerous courts in the United States.

§ 22 *con.* When a debt is to be paid by instalments and interest, though it runs from the date of the bond, is not demandable till the instalment falls due, and a payment is made —computation is—an instalment of $500 is due January 1, 1825, with interest from January 1, 1824: July 1, 1824, obligor pays $207, the $7 is six months interest, and $200 part of the principal.

4 Rand. 406—412, Childers v. Deane and Page.

Compound interest will not be allowed except under special circumstances: 2. An agreement *at the time of the loan*, that at the end of the year interest shall become principal, or after interest has become due, an agreement that it shall bear interest *previous* to such agreement, is not allowable as tending to usury: 3. But where a settlement of accounts takes place, *after interest has become due*, and an agreement *then* is made, that interest due, shall *thereafter* carry interest, is legal:

4. The principal and interest are computed in a master's report, and that is confirmed; in these cases *compound* interest is lawful: 5. To constitute usury, there must be an *intention* to take more than legal interest: 6. The mistake of the scrivener in putting one sum for another is not usury: 7. If the creditor adopt a mode of calculation, that gives to him more than legal interest, and he knows it will, he is guilty of usury, though he may not suspect he is violating the law: 8. Substance is, if the parties, *before* interest becomes due, agree that it shall draw interest when due, it is tending to usury and not allowable: 9. But *after* interest is become due and payable, and is not paid, it is legal for the parties to make it principal, or bear interest: 10. When *tending* to usury does not make the contract void: 11. The agreement that interest *becomes due* shall carry interest, must be *prospective* only. Cited 6 Johns. Ch. 313, 319, Vanbenshooven *v.* Lawson; Thornhill *v.* Evans, ch. 112. a. 2. s. 22; Chambers *v.* Goldwin, 9 Ves. 254; Waring *v.* Cunliff, 1 Ves. Jr. 99; Connecticut *v.* Jackson, 1 Johns. Ch. R. 13. II. Ch. 41. *Art.* 1. *Con.*

Assumpsit on a promissory note payable to the plt's. testator, 'with interest annually,' on a certain sum. This is not a contract for anything more than six per cent. on the principal. But interest was cast on the annual interest in the nature of damages for its detention and use, from the time it became payable till judgment, not *compound* interest, but *simple* interest on interest, after it becomes due and payable and is not paid. For instance, January 1, 1820, A lent $1000 to B to be paid on demand 'with interest annually,' expressed or understood, January 1, 1821, $60 interest becomes due, thence this $60 is to be on legal interest until paid; and on the general principle, money due and payable at a time fixed, and then not paid, in justice bears interest from such time—many cases cited. 1 N. H. Rep. 179—184, Peirce & al. exrs. *v.* Rowe.

§ 28 *con.* Legacies $1000 to each of thirteen children, and the residue is bequeathed to them interest, from the death of the testator. The testator directed his whole estate to be sold by his executors when they thought most expedient, his debts to be paid, then these legacies according to seniority. There was no provision for these children but said legacies. Interest on each instalment. Sec. 38 *con.* 2 Rand. 409—417. 4 Har. & Mc H. 38.—2 Brown, 93, 97. —Hopkins *v.* Deavis, 1 Binn. 152.

§ 59 *con.* *Assumpsit*, goods assigned to a bailiff to sell and render an account. Interest is allowable in such cases, and in actions for money had and received from *the time of the demand made*, where the deft. has refused to account or to make payment, or has converted the money to his own use. Rapelie *v.* Emory, 1 Dall. 349: interest allowed on mone 18 Mass. R. 218, Weeks *v.* Hasty.—See 1 Mason, 117, Pope & al. *v.* Barret.

II. Ch. 41. *Art.* 1. *Con.*

had and received viewed as money lent. Per Shippen, President. State *v.* Crevor, 3 Binn. R. 123, Tilghman, C. J. said interest due on money received by one of another and detained against his consent. A deputy sheriff received the deft's. money, under a pretence of attaching it, and embezzled it. Held, the sheriff was liable to pay the amount to the deft. and interest *from the time the deputy received it.*

Ch. 75. a. 8. s. 4.—1 Binn. 488.

17 Mass. R. 417, 418.

§ 62. Rules in casting interest on bonds, notes, &c. on partial payments made. 1. Every payment is to be applied to keep down the interest: 2. The interest is never to be allowed to form a part of the principal, so as to carry interest. Hence, the rule is to cast interest from the time it commenced to the time of the first payment endorsed, to add this to the principal, and from the sum to subtract the payment. On the remainder interest is cast to the second endorsement, which is added to the remainder and from the sum is subtracted the second endorsement, &c. and to the time of the judgment. 'This method is correct, whenever the payment exceeds the amount of interest due at the time of payment; but is not to be used when the interest exceeds the payment, for the effect in such case would be to give compound interest, which the law does not allow.' In fact, the plain rule is to avoid usury, never to compute interest so as *to increase* the principal drawing interest, and if a principal of $1000 be reduced to $600, never after can more than $600 draw interest.

1 Pick. R. 194–198.

§ 63. There are several cases in which the law allows compound interest; as where in a judgment of court both principal and interest are included, and that judgment is sued, the court cast interest on the whole amount on the statute of 1796. See Guardians, &c. ch. 35. a. 12. s. 17; 2 Rand. 401.

§ 64. *Interest raised by law—effect on existing contract.* In Virginia previous to June, 1796, legal interest was five per cent. a year. In that month it was raised to six per cent. and has so continued. While at five per cent. A gave B a note to pay $284 on demand with interest. In 1819 the note was sued and the debtor confessed judgment in the superior court, and the court computed interest at six per cent. In the court of appeals, held an error in law, and the interest reduced to five per cent.

1 Rand. 25–38, Bent v. Patten, &c.

1 Hop. Ch. R. 424–429.

§ 65. A faithful guardian, but somewhat negligent, pays only simple interest on his ward's money. All the profits he makes: compound interest only when grossly negligent. The guardian mixed said monies with his own, and had the use of them, was charged simple interest.

§ 66. An executor directed to vest the testator's personal estate in the funds, unnecessarily selling out stock, keeping

large balances in his hands, and resisting payment of debts by false pretences of outstanding demands, is charged with five per cent. interest and costs, but the court refused to make rests in the account. The court, on examination, found the balances in his hands from time to time large for eleven years. 1 Jacob & W. 566, 569, Crakelt *v.* Bethune; 1 Johns. Ch. R. 620; 4 Hen. & Mun. 431.

§ 67. It is the first duty of an agent, trustee, or executor, receiver, to be always ready with his account, and his neglect in this is a ground for charging interest. 1 Jacob & W. 135.

§ 68. Is allowed on the balance found by the master's report from the date of it to which he computes interest, Interest is not allowed on interest of a bond debt computed in a report, &c. 1 Hop Ch. R. 344. 1 Jacob & W. 39.

§ 69. Any writing fixing the sum due exactly, and the time of payment, is a ground of interest. Hence an order by an agent on his principal for a sum agreed on in favor of a carrier for freight due, will carry interest from its date. Elliott *v.* Minott, 2 Mc Cord, 125.

§ 70. The much examined case of Reid *v.* the Ransselaer Glass Factory, 3 Cowen, 393 to 438. *Assumpsit* to recover the balance of an unsettled account brought by Reid's administratrix, he having been the general agent of the company. The declaration was for money paid, laid out, and expended, money lent and advanced, by the intestate for and to the use of the defts., money had and received by them to his use, goods, &c. sold and delivered, work, &c. done, materials found by him, &c. for salary. Account stated. Plea, never promised. May 1, 1812, the company contracted with said Reid & Alsop, two stockholders, for a year, to conduct its concerns, R. & A. to make the necessary advances in money and *receive interest.* May, 1813, it appointed Reid their general agent. *Large advances being necessary to carry on the business*, and the company provided none. No salary was agreed on, but the prior agent had $1200 a year, and this was reasonable for Reid, till the factory was burnt, May 3, 1815. He continued agent till he died in August, 1821. The parties lived near together. As agent he advanced for the business in five hundred and twentyseven items $107,549.74, and credited in seven hundred and eightyseven items $100,099.88. He never rendered any account, nor informed the company of any balance due to him till January 2, 1819, when he was requested by one of the directors to present his account. After his death his administratrix claimed *interest* on the advances and salary. Held, no interest was due on the salary, but two judges allowed interest on the advances to January 2, 1819. Woodworth, J. gave no opinion, being a stockholder. Nu-

II. Ch. 41. Art. 1. Con.

merous English authorities in law and equity were cited by the court and counsel, generally cited in this work, and admitted by the court and the counsel that they did not allow such interest. Lord Ellenborough and the judges denied it in the cases of De Haviland *v.* Bowerbank, 1 Campb. R. 50, A.D. 1807, where he said, when money of the plt. had come into the deft's. hands, interest ought not to be recovered, without an agreement, or something from which an agreement might be inferred, or proof the money had been used. In De Bernales *v.* Fuller, 2 Campb. R. 426, A. D. 1810, he adhered to the same rule, and the whole court of king's bench concurred, that the money should not draw interest even after a demand of payment; and in Calton *v.* Bragg, 15 East, 223, A. D. 1812, Lord Ellenborough said no case for eighty years had occurred to his knowledge, where interest had been allowed on monies lent without an agreement for it, or for the payment of the principal at a certain time, or under special circumstances from which a contract might be inferred. But the two judges held the American cases allowed interest more extensively than the English and cited cases in Pennsylvania, Massachusetts, Connecticut, and New York. *Pennsylvania*, Rapelie *v.* Emory, before cited, was A. D. 1788, the opinion of one judge of an inferior court. Cited in Crawford *v.* Willing, 4 Dall. 289, A. D. 1803, the opinion of Smith, J. he said, as cited, 'whatever may have been the doctrine in former times, we have traced with pleasure, the progress of improvement upon the subject of interest to the honest and rational rule, that wherever one man retains the money of another, *against his declared will*, legal interest is allowed, no doubt because he detains it *against the declared will of the party.*' In the lessee of Dilworth *v.* Sinderling, 1 Binn. R. 488, A. D. 1808, Tilghman, C. J. declared the law to be settled, that interest is recoverable on an account for money lent and advanced. Allowed a trustee on monies beneficially advanced, &c. The State against Crevor, 3 Binn. 123, A. D. 1810, he says it is settled that interest shall be recovered against a man who receives the money of another and *holds it against his consent.* No doubt, for this implies, as in the case of Smith's opinion, the money, in some way, has been demanded, otherwise how is it *held against his consent.* In Brown *v.* Campbell, 1 Serg. & R. 179, A. D. 1814, he again says, the rule is to allow interest when the deft. has *retained money* of the plt. unlawfully *and against his consent*, again no doubt for said reason just stated. In this case of Reid it seems to have been agreed, at least by the counsel, that Pennsylvania had gone further than any other in allowing

State interest. Were it necessary to question her cases, it might be observed, they, as cited, rested on the opinions of individual judges. II. Ch. 41. Art. 1. Con.

Massachusetts. Cited Wood *v.* Robbins, 11 Mass. R. 504, A. D. 1814; cited s. 60 this article. In this case the money was obtained by *fraud*, so the decision is not questioned. Winthrop *v.* Carlton—interest only *after the action brought.*

Connecticut. Interest seems to be allowed only on contracts, expressed or implied, or for the violation of some duty, as in Selleck *v.* French, 1 Con. R. 32–35, per Swift J. A. D. 1814, stating cases. Thompson *v.* Stewart, 3 Con. R. 171, not much to the point. Circuit Court, Gammell *v.* Skinner, 2 Gal. R. 45, A. D. 1814 interest derived on seamen's wages, until after demand made.

New York. Cited Liotard *v.* Graves, 3 Caines. R. 224—245, A. D. 1805, the case most relied on to support Mrs Reid's claim of interest on money advanced, is said to be the leading case, (not cited in Wood *v.* Robbins,) but cited ch. 30, a. 11, s. 13, to another purpose as it mainly was. The reporter says, 'on an open account current, interest is not allowable, unless by the custom of the trade, or by private agreement. In this case Liotard & Co. claimed interest by one of their counsel on British usage, by Benson, their other counsel in these words—the manner in which this account is made out, is in itself a proof that such was the custom between the plts. and the defts. It is, therefore, from the fact thus appearing, a matter of law whether interest be due or not. Thus the claim of interest is in part made on some *special circumstances in the case*, and in almost every American decision, allowing interest beyond the English, if not in every one, this will appear to be the case. Such as fraud, detaining money after demand or against consent, unreasonable delay implying the money is called for; some usage between the parties, as in this case of Reid, administratrix, *v.* the Glass Factory, the deft. had allowed interest on monies advanced by Reid and Alsop, who preceded Reid in this same agency. This circumstance Savage C. J. noticed as being of weight in the cause, and his conclusion from all the cases he cited seems on the whole, to be a fair conclusion. He says, on the whole I am of opinion, that from the manner in which the business had been done, the year next previous to the appointment of Reid, the agent, (in it such interest allowed,) from this being done with a full knowledge on both sides, that large advances were necessary. If the defts. did not mean to pay interest, they ought to have informed Reid, in order that he might not be using a large capital in their service, when it was to be totally unproductive to him. Page 436 Savage C. J. says from an examination of these cases, (several N. York cases added.)

II. Ch. 41. *Art.* 1. *Con.*

It seems interest is allowed: 1. Upon a special agreement: 2. Upon an implied promise to pay it, and this may arise from usage between the parties, or usage of a particular trade: 3. Where money is withheld against the will of the owner: 4. By way of punishment for any illegal conversion or use of another's property: 5. Upon the advance of cash on the authority of Liotard *v.* Graves. As to this case it is clear the interest was a small secondary matter in it briefly mentioned by each judge, and no one authority cited by either of them, the idea of each was that interest was chargeable on the money advanced.

Rensselaer Glass Factory *v.* Reid, admx. 5 Cowen, 587-643.

§ 72. See this case, § 70; this chapter stated at large; the judgment rendered by the supreme court is affirmed in this court of errors, 15 to 10. There is but little new in this court of errors in favor of the interest on monies advanced—but several new authorities and reasons against it, cited and urged, especially by Spencer, Senator, from page 604 to 633. He proceeded on the principle there can be no interest unless promised expressly or impliedly, examined the authorities minutely—pages 608, 9, history of the law of interest, relies on Calton *v.* Bragg, decided against interest on monies lent, &c. in England. Jefferson's letter to Hammond, page 11, &c. cites sundry cases of implied promises, &c. as Eddowes *v.* Hopkins; Blaney *v.* Hendricks; Robinson *v.* Bland; Day *v.* Brett.; Brown *v.* Campbell; Liotard *v.* Graves; Dilworth *v.* Sinderling; De Bernales *v.* Fuller; Crawford *v.* Witting; State *v.* Crevor; Wood *v.* Robbins; Selleck *v.* French; Wyman *v.* Hubbard; Trelawney *v.* Thomas; Murray *v.* Coster; all found in this work, and near all in this chapter. Spencer also cited from 20 to 30 other authorities. All these many cases, rules and opinions, shew how unsettled the law of interest is.

In this case of the Glass Factory among the numerous cases cited, in all the courts, for and against interest, it seems to be agreed that interest had been further allowed in the *law* courts of Pennsylvania than many other *law* courts. Here it must be observed that the *law* courts in that state, because there has been no court of *chancery*, have, absolutely, assumed *chancery* powers; therefore their decisions in *equitable* matters, are no rule for other *law* courts, especially, in N. York, where there is, and ever has been, a chancery court, unless the law courts there exercise powers in *equity* under the revised constitution. Consideridering these and other circumstances, may we not well infer that the *legal* rules as to interest, are those found in the *law* decisions in England?

§ 73. Court of errors in New York, A. D. 1828, case important as to interest, to be allowed by executors, guardians, trustees, &c. De Payster *v.* Clarkson; appeal from the decision of Jones, Chancellor, held in said court of errors: 1. That an

executor, guardian, or other trustee using the monies of the trust estate himself, instead of investing them, is bound to pay interest for the use of such monies : 2. That such interest is to be computed, annually, and to be treated as a disbursement fund, out of which, from time to time, and in the first instance, all payments are to be made, instead of resorting to monies actually received. II. Ch. 41. Art. 3. *Con.*

§ 74. Interest runs on arrears of taxes owed by a county to the State, after thirty days, &c. act sess. 48, ch. 20, s. 4 : 2. If the debtor pay the amount of the principal, and this is not specially received in extinguishment of the principal by the creditor, he may sue for the amount of interest. If made generally, it applies first to the interest, and the balance is due as principal. The English authorities are denied, and a good rule laid down, that is, 'whenever the debtor knows, precisely, what he is to pay, and when he is to pay, he shall be charged with interest, if he neglect to pay.' The People v. the County of N. York, 5 Cowen, 331–337.

CHAPTER XLII.

JOINT INTEREST.

§ 14. The first endorser of an accommodation note cannot have contribution against the second endorser on the ground he pays the whole to the bank, and the maker is insolvent. Hixon v. Reed, 2 Littell, 174. One joint endorser who pays the whole note to the bank, must prove the drawer insolvent in order to have contribution of another joint endorser. Art. 1. *Con.* Pearson v. Duckhern, 3 Littell, 386.

§ 7 *con.* A devise to baron and feme is not a joint tenancy, but each takes the entirety, and the survivor the whole, not within the Virginia statute as to joint tenants ; the Virginia act is in these words, 'If partition be not made between joint tenants whether they are such as might have been compelled to make partition or not, or of whatever kind the estate or thing holden or possessed be, the parts of them who die first, shall not accrue to the survivors, but shall descend or pass, by devise, and shall be subject to debts, charges, curtesy or dower, or transmissible to executors and administrators, and be considered to every other interest and purpose in the same manner, as if such deceased joint tenants had been tenants in common.' Art. 2. *Con.* 3 Rand, 179—190, Thornton v. Thornton. 16 Johns R. 110—5 Johns. C. C. 437.

§ 11 *con.* A. D. 1775, *John Miller* conveyed lands to *Mary Miller* and *Lucy Miller* 'jointly and severally,' habendum to them the said *Mary* and *Lucy*, their heirs and assigns forever. Mary died, and the plt. as one of her heirs, claimed on the principle she was tenant in common, was clearly so on said statute, and doubtful at common law ; main point decided was that this act may operate *retrospectively*, when to make the estate 16 Mass. R. 59—62, Miller v. Miller.

II. Ch. 42. Art. 1. *more valuable*, as in this case, and so it is not unconstitutional to make it so operate.

Con.

Jackson v. Brink, 5 Cowen, 483–485.

§ 14 *con.* Though a tenant in common enter without claiming *adversely* to his co-tenants, yet his possession may, afterwards, become *adverse* by some open or notorious acts, and claim of title, as if he purchase the interest of his co-tenants, under a deed from the sheriff, and this though the deed be defective for want of a particular description of the land: 2. To constitute *adverse* possession it is not necessary the deed under which he claims be valid: 3. The rule that an *adverse* possession to bar an action of ejectment, must be hostile in its inception, and continue so for twenty years, does not apply to the tenant's entry, but *to the act by which his possession becomes adverse*; to become so there must be some notorious act or claim. 5 Wheat. 124; 7 id. 120; 9 Johns. 163; 15 id. 501—may become so. 16 John. 301; Cowp. 217; 7 Wheat 120; 3 Cowen 74; ch. 104, a. 4, and the words Possession, and Twenty Years, in the index.

6 Cowen, 632, 635.

After an exclusive and uninterrupted possession of land by one tenant in common near forty years, without any account with his co-tenants, the jury are authorized to presume an ouster, and an action of ejectment by the co-tenant is barred.

CHAPTER XLIII.

LEGACIES.

Art. 1. *Con.*

1 Pick. R. 468–473, Shattuck, admr. v. Stedman & al. exrs.

§ 5 *con.* Facts agreed and held; a vested legacy; J. R. bequeathed to his neice M. C. the interest of $1000 during her life, and after her decease the principal sum to be equally divided among her children and payable to them at their respective ages of twentyone years with interest. A son of M. C. survived the testator, but died before his mother, after twentyone years of age. Court cited 2 Salk. 415; 1 Burr. 228; Boraston's Case, 3 Co. 21; 3 D. & E. 41; 14 East 601; 1 M. & S. 327; 1 New R. 315; Eq. Ca. Abr. 548, pl. 27; 3 Atk. 428; 1 Bro. C. C. 298; 2 do. 75.

1 Rand. 208–210.

A legacy is left in *trust* and the trustee refuses to act, the executor is not bound to pay it till a new trustee is appointed by the court of chancery, nor interest in the mean time. Cited 3 Munf. 198, where decided there is no interest where there is no one to receive the legacy, it not appearing the executor makes interest.

1 Rand. 318–322, Tazewell & al. v. Smith's admr.

A testator directs his real estate to be sold, and the proceeds to be paid to particular persons, the interest of the legacies is a *vested* interest, though the will may direct the executor as to the

time of selling: 2. The same if the estate to be sold, be a remainder: 3. A legatee's interest is not defeated if he die before the sale: 4. The interest in the proceeds of the sale is as much a vested interest, as if the land itself had been immediately and directly devised. II. Ch. 43. *Art.* 1. *Con.*

§ 6 *con.* Several authorities as 16 Ves. 489; 4 Rand, 213; 3 P. W. 175; 3 Bulst. 101; Hob. 285.

§ 16. *Testator names one thing and means another*, &c. The testatator bequeathed £1000 long annuities, 'now standing in my name, or in trust for me.' At the date of the will she had no long annuities, but had £1000 three per cent. reduced annuities. Held, this sum passed by the bequest. It could not be found that any long annuities ever belonged to her; like case Dobson *v.* Waterman, 2 Ves. 306; Door *v.* Geary, 1 Ves. 255. 2 Jacob, & W. 207—211, Penticost *v.* Sey.

§ 9. Error from the Common Pleas. *Assumpsit* by Deyo and wife *v.* Kelsey, for a legacy bequeathed to her, and alleged in their declaration, to have been charged on the real estate devised to Kelsey; that he entered, &c., and became liable to pay, and promised, &c.: plea *non assumpsit*. Art. 2. *Con.* Kelsey *v.* Deyo and wife, 3 Cowen, 133–147.

Held, 1. An action, at law, lies for a legacy, directed by a will to be paid by a devisee of the lands, and expressly charged on them, if the devisee has entered on them and promised to pay it: 2. Part payment is conclusive evidence of such a promise: 3. So, where from the whole will it appears to have been the testator's intention that the legacy should be a charge on the land devised, though the land be not expressly charged with the payment: cited for Kelsey, 3 Johns. Ch. R. 319; 7 Johns. R. 99; 10 id. 30, Toll. L. E. 240; 2 Bl. Com. 512; 3 Ves. Jun. 114–295, &c., &c. For Deyo and wife were cited, 3 Johns. Ch. R. 189; 7 id. 99, Toll. L. E. 410; 9 Ves. 454; 3 Johns. Ch. R. 312; 2 id. 314; Ambl. 33–37; 10 Johns. 30; 18 Johns. 31, &c., &c. One objection to the action was, that the legacy was not charged on the lands, &c.: 2. objection it was a charge on the *personal* estate, so belonged to the court of chancery. The court thought it was the testator's intention, on his whole will, to discharge his *personal* estate, and charge his land. The court added Cowp. 284–289; 3 East, 120; 5 D. and E. 690.

§ 10. *Assumpsit* for $100 for a legacy bequeathed to Mrs Tole by her father's will. Held, an action lies against a devisee, for a legacy, charged exclusively on the land devised to him, or on one's person, in respect to the land, if he enter and promise to pay; but the aid of the personal estate must be excluded, expressly, or by necessary implication on the face of the will: 2. What is an entry and promise, is a question on evidence to a jury: 3. The assent of the executor is not necessary to a Tole and wife *v.* Hardy, 6 Cowen, 333—342.

II. Ch. 43. *Art.* 2. *Con.*

legacy charged on land: 4. The personal estate is always the primary fund for the payment of legacies, unless expressly excluded by the will. As it did not appear the aid of the personal estate was excluded, the court held, the case belonged to chancery, and gave judgment for the deft., the devisee.

Art. 7. *Con.*

§ 14. A bequest of all the testator's right, interest, and property, in shares of the Bank of the United States, is a *specific* legacy. 7 Johns. Ch. R. 258.

If a debt or specific chattel be bequeathed, the specific legacy is adeemed or extinguished, in the testator's life time, by the payment of the debt, or the sale, or the conversion of the chattel. But a pecuniary legacy bequeathed generally, is not adeemed, or extinguished, though the fund out of which payable, be extinguished: nor is a legacy of bank shares destroyed when the testator's interest is changed, and this is produced by operation of law, as where the testator bequeathed 30 shares in the first bank of the United States, and before his death the charter expired, and all its property and funds were conveyed to trustees, who divided the funds received by them, from time to time, among the stock-holders, and the testator received dividends on his shares, but did not sell or dispose of them. Held, this was an ademption of the legacy *pro tanto* only, and that the legatee was entitled to the dividends payable after the death of the testator, id.; so where the testator bequeathed to the plt., two shares in the *Western Inland Lock Navigation Company;* and the shares, in the testator's life time, were, by some arrangement, increased to six, and the stock, under an act of the legislature, vested in the State, and a certain sum was paid to the stockholders as a compensation for its value. Held, the legacy was not adeemed or extinguished, id.

Walton *v.* Walton, 7 Johns. Ch. R. 258.

Art. 8. *Con.*

§ 8. *What is a legacy and double remedy, &c.* Facts agreed, that C. Baker, father of the plt., died in 1808, having bequeathed and divised to his son John Baker, his heirs, and assigns forever, all his estate, 'on condition' he pay the testator's debts, funeral charges, legacies, and bequests, and should also support the plt. in health and in sickness during her life. John Baker entered on the land and occupied during his life, mortgaged parts of it, and supported the plt. (a non compos) till he died insolvent, Sept., 1821; was executor, and assumed the trust, returned an inventory, but settled no acconnt; paid debts and other legacies. Held, the provision for the plt. was a *legacy*, and judgment for her; also held, she might have entered for condition broken: see many cases cited; and a. 1, s. 9.

2 Pick. R. 619—621, Baker *v.* Doge, administrator, *de bonis non* of Cornelius Baker.

Art. 9. *Con.*

§ 4. *A pecuniary legacy* is no charge on lands devised, unless there be express words, or a plain implication from the words of the will. 10 Wheat. 204–245, Wright *v.* Denn; Marhant *v.* Twisden, Gilb. Eq. R. 30; Canning *v.* Canning, Moseley's R. 240.

§ 9. An action for a legacy will not lie until after a demand on the executor. 3 Pick. 213–221; Mills by *prochein amie* v. Boyden executor. II. Ch. 43. Art. 14. *Con.*

CHAPTER LXIV.

LIENS.

§ 5. A lien is not attachable, as it is neither a *jus ad rem*, nor a *jus in re;* is but a bare right to detain the thing, nor is it a chose in action. 1 Mason, 319. Art. 1. *Con.*

§ 6. In New York the *lien* on the debtor's real estate is acquired by *judgment*, on his personal estate, by the delivery of of the execution to the sheriff, not after verdict, and before judgment. Can a plt. *attach*, when he lives in New York, as he can in Massachusetts? 1 Hop. Ch. R. 367.

§ 7. *When no lien among owners of a vessel.* As where A owned three fourths, and B one fourth of a brig and cargo, consigned to the master for sale, in a foreign port. A drew a bill of exchange on him, ordering it to be charged to himself. Bill is discounted, and the money received by A. Master paid the bill out of the proceeds of the brig and cargo. B assigned his interest in them to C. Held, A had no claim on B's interest, either by way of *lien* or setoff, to secure advances he made to B, before the brig sailed, or between that time and the assignment, or for a general balance of accounts; and A was held to show, B agreed the bill should be charged to the whole proceeds of the brig and cargo, and not to A's part thereof. 4 Pick. 456–456.

§ 8. *Lien claimed under a bailee cannot be supported.* As where the plt. brought trover, being the owner of the goods, against the deft., who took them from the bailee. Held, the deft. could not set up his lien to defeat the action.

§ 5 *con.* Appeal from the Circuit Court of the District of Columbia. Held, 1. The vendor of real property, who has not taken any separate security for the purchase money, has a *lien* for it on the bond, against the vendee and his heirs: 2. This lien is defeated by an alienation to a *bona fide* purchaser, without notice: 3. So, as to creditors holding under a *bona fide* conveyance from the vendee. Art. 2. *Con.* 7 Wheat. 46–58, Bailey v. Greenleaf & al.

§ 7 *con. Joint purchaser's lien.* A and B jointly buy land, and give their notes for the payment of the purchase money, and take a conveyance from the vendor. B becomes insolvent, and A pays more than his moiety of the purchase money. A has a lien on the land to reimburse him all he has paid above his moiety of the purchase money, in preference to B's creditors claiming under a deed of trust from B, unless they appear to be purchasers without notice: was a case in chancery. The vendor took no 1 Rand. 428–431.

II. Ch. 44. *Art.* 2. *Con.*

security but the said notes, so had a lien on the land while in the hands of the vendee. Volunteers or purchasers with notice. Taking a note for the payment of the purchase money, does not affect the vendor's lien; and if part is paid, the lien is good as to the vendee, and the vendee becomes a trustee as to the part not paid. Cases cited, 6 Ves. 483–759–760; 15 Ves. 328; 1 Bro. 420, Sugden's L. of V. 352; 4 Hen. & M. 113; thus stood the vendor, the creditor: A was surety for B, and stood in the creditor's place: 10 Ves. 412, 11 Ves. 22, 14 Ves. 162; 2 Johns. 554, 4 Johns. 130; 1 Rand. 53, 4 Rand. 275; same lien as to a joint purchaser.

Art. 3. *Con.*

3 Pick. 424—428, Moody v. Webster.

§ 14 *con. Policy broker's lien. Assumpsit* for money had and received: facts stated. Nathan Bond was formerly an underwriter in an insurance office kept by Joseph Taylor. Bond became a bankrupt, and the plt. was appointed assignee on his estate. Taylor kept a running account with Bond of premiums received, and losses payed by him for Bond. Balance for Taylor was more than the sum sued for; never paid nor claimed under the commission. The deft. as agent of Taylor received the monies in question, for Bond's losses under the Spanish treaty of Feb. 1819, and Taylor's executor claims the amount of the deft. Taylor retained the policies, &c., and deeds of abandonment, till his death, and, afterwards, remained with his executor, who laid them before the commissioners under said treaty, to support the claims. Held, Taylor's executor had such a *lien* for his said balance on the polices, &c., as to enable him to apply the proceeds to pay it: plt. nonsuited; the same principle, 1 Mason, 192, Gilman *v.* Brown.

12 Wheat. 177 180, Rankin, &c., plts. in error v. Scott.

§ 21 *con. Liens by judgments.* Ejectment from the district court of Missouri. Held, the *lien* of a judgment on the debtor's lands, created by statute, and limited to a certain time, is not affected by the plt's. not proceeding on it during that time, unless a subsequent *lien* be obtained and carried into effect: 2. It is a universal principle that a prior lien is entitled to prior satisfaction out of the thing it binds, unless that lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity: 3. Mere delay in proceeding to execution, is not such act.

In New York; 1 Cowen, 481–501, Dickerson *v.* Gelliland: how long it continues.

In Maryland, a *judgment* is a lien on land in the tertenant's hands, though a purchaser at a sheriff's sale, under a *fieri facias*. A lien on lands by judgment, is preserved by the treaty of peace of 1783, though the payment had been made in paper money under a State statute.

3 Har. & Mc. H. 449—451. p. 140.

1 Mason, 192 223, Gilman v. Brown & al.

Generally, there is a lien on land sold for the purchase money not paid, as between seller and buyer, so as to after pur-

chasers from the vendee with notice, the purchase money is unpaid; but there is no lien on the land as to a purchaser *bona fide*, without such notice; but if any parties do an act showing, clearly the lien is not relied on, there is none: as if the vendor takes a distinct security for the price either of property or of surety; but the bare note or bond of the buyer, does not waive the lien. A lien is neither *jus ad rem* nor *jus in re*—is a mere thing in equity only, and its existence is not to be relied on until established in equity: there is none such in Massachuseetts or Maine.

A judgment is not a lien on a mere equity, and such an interest cannot be sold on execution; therefore, if A convey land to B, to hold as trustee, under an equitable obligation to convey to C, A has no interest on which a judgment against him can be a lien, so not to be sold on execution. Jackson v. Chapin, 5 Cowen's R. 485—488.

§ 26. No lien on a ship for supplies in a home port. 12 Wheat. 611–643; as s. 26, a. 3, ch. 44.

§ 8. *Liens of executions.* If nothing be done on a *fieri facias* for a year and a day, it does not lose its *lien*, but only its active energy. The *lien* commences on the delivery of the execution to the sheriff; and 1 M'Cord, 414: a *fieri facias* was lodged in the sheriff's office in Charleston District, marked 'lodged to bind.' This, the court viewed as a stay, and afterwards, a *fieri facias* was delivered to the city sheriff, with an order 'to levy and sell,' and he sold personal property accordingly of the deft., and had the proceeds in his hands. Upon a rule, the court held, the execution first delivered should be first paid. Art. 5. Con. South Carolina. 1 Bay. 295.

§ 9. Liens of *judgments.* Two Judgments or executions of the same day, neither has the preference. Every judgment binds for the same amount. S. Carolina; 1 Nott & M'Cord, 405–407; 1 Bay. 213.

§ 10. *Liens material men have* for building, rigging, repairing, supplying, &c., ships, &c. See ch. 57, a. 5, ch. 186, a. 5, a. 11.

§ 11. The United States' *prior lien.* Trespass for taking and carrying away goods, imported by one indebted to the United States on customhouse bonds due. On the goods' arrival they were attached by a private creditor, by a deputy sheriff, and the creditor held them, though afterwards attached and seized for said debt to the United States. They having no lien on them, though deposited in their custom-house. The debts to them arose on goods previously imported. However, the court thought the right of the United States to these goods so attached, the duties thereon, not being paid or secured, must be tried in a different action. 5 Pick. 120—124, Dennie v. Harris.

II. Ch. 45. *Art.* 3. *Con.*

CHAPTER LXV.

MARKETS OVERT, AND FAIRS.

§ 3. Though markets overt, and fairs are but little known in the United States, and actions relating to them in England are scarcely ever brought of late years, yet we find in the old cases on this subject, some principles which often come under consideration, as appears in this, and other chapters in this work. We, however, find one modern case of importance in Barn. & Cres. 363–375; Prince & al. *v.* Lewis. In this case, the plts. owned a certain toll market, called *Covent Garden market*, for buying and selling all kinds of fruits, flowers, vegetables, roots, and herbs. This market had been granted by the king to a person, his heirs, and assigns, in a place described. The said grantee, for his own profit, had permitted part of the space allowed, to be used for *other purposes* than those specified in the grant. The remaining part of the space granted, became insufficient for the public accommodation, and there was not on ordinary occasions, space within the market for carts and wagons resorting there with vegetables. Held, the lord of the market could not maintain an action against a person, for selling vegetables in the neighbourhood of the market, and thereby depriving him of his toll, even at a time when there was room in the market, without showing on the day when the sale took place, he gave notice to the seller that there was room within the market. The grant was made by King Charles the II.; the decision in 1826. In this case is involved a general principle, that is, if a man, by grant, has a specified privilege in a described place, and for specified purposes, with intent he shall accommodate the public, he cannot complain his privilege is invaded, unless, 1. He afford the full public accommodation intended in the grant: when he abridges that accommodation, he cannot claim his whole privilege: 2. He cannot complain his privilege or grant is invaded by A, unless he offers A sufficient accommodation.

CHAPTER LXVI.

MARRIAGE.

Art. 1. *Con.*

§ 2 *con.* Massachusetts statutes, A. D. 1646, May 1647, May 1655, May 1670: Col. & Pro. laws, pp. 151, 152; A. D. 1695, said laws 242, 283, 285, 416, 462, 679; laws formerly in force respecting marriage, now obsolete or repealed.

§ 4 *con.* This is still the law of Scotland: see Dr Haggard's Reports, 2 vols., of the decisions of the Consistory Court of

London. This is amply proved to be the law of Scotland by the case A. D. 1811–1814, of Mrs Dalrymple, formerly Miss Gordon, *v.* John William Henry Dalrymple, of a noble family in England. Being an officer in the king's dragoon guards, went with his regiment to Scotland at the age of 19. There he became acquainted with Miss Johanna Gordon, of a respectable family. Thinking his father would not approve of his marriage with her, they secretly made a mutual *written promise* of marriage; afterwards, a mutual *declaration* and acknowledgment of a marriage; and she produced in court a renewed *declaration* in writing, made by him seven weeks after the first, accompanied by a promise to acknowledge her the moment he had it in his power; and an engagement on her part that *nothing but the greatest necessity* should compel her to publish their marriage. In his letters to her, he applied 'the terms of husband and wife to himself and her.' They had clandestine nocturnal interviews at Edinburgh and Braid,—the country seat of her father. He returned to England 1804, and 1805 he sailed for Malta; continued abroad till 1808. His father died in 1807, and he married another lady in the most formal and regular manner. Miss Gordon, immediately on hearing of this marriage, came into England, brought her papers, and claimed him as her husband in a proper court. Sir William Scott decided he was her lawful husband, and on appeal to the highest court in the case, that of Delegates, Scott's decision was confirmed, though every possible exertion was made in defence of Mr Dalrymple, he was ordered to receive her as his wife. The decree was '*a restitution of conjugal rights.*' It is believed we can have no such decree in the United States; but that there must be in some of the States such marriages, because every other marriage must be in virtue of some special law of the church or State, that is, every marriage must be by the *contract of the parties only*, unless the law or religion of the land, adds some prescribed ceremonies. These can only be legislative acts, or canons of the church: it is believed, in some States, there is neither, as ever has been the case in Scotland, and was the case in England, till the marriage act. Hence it has been well observed, 'it is perfectly clear that by the canon law, which is the acknowledged basis of the marriage law in all Europe, and in most, if not all those States in the Union, where there are no statutes to control it, consent alone to a contract of marriage, *per verba de præsenti*, is sufficient to render the marriage binding, without any other act.' Such was the law of New York as late as the year 1809, appears in the case of Fenton *v.* Reed, 4 Johns. R. 52: see s. 9. What marriage law was there in Massachusetts before 1639?

26 George II.

A marriage produced by abduction, terror, and fraud, is an-

II. Ch. 46. *Art.* 1. *Con.*

nulled in chancery. 1 Hop. Ch. R. 478–495; Ferlat, by her next friend, *v.* Gojon.

2 N. H. Rep. 263—268. p. 515.

Marriage is a civil contract, and the solemnization of it is to give publicity to the contract; and if solemnized before an acting magistrate, or minister, though not duly qualified, the settlement of the female is changed by the marriage. So, though procured by one of the towns litigating, if no fraud be practised. A contract to marry another at the end of five years, is void by the statute of frauds, unless in writing; and 1 Mod. 155; *verba de presenti*, &c.

Art. 2. *Con.*

§ 1 *con.* Who is *a settled ordained minister*, within the meaning of this section: see 2 Greenl. 102–109, Ligonia *v.* Buxton. A minister ordained over an unincorporated religious society, composed of members belonging to several towns, is not such minister of the gospel settled and ordained within the meaning of this section; and marriage by him is void: 2. A marriage solemnized by a minister at his own house, and neither of the parties residing in the town, is void under the act, and this is not altered, in this respect, by statute, 1811, ch. 6: 3. The resolve of Main, March 19, 1821, does not render valid a marriage solemnized against the laws then in force: 4. It only confirms those, which through misapprehension of the law, were defectively solemnized; the minister being not a stated ordained minister, though erroneously supposed to be such; a *pauper* cause. The court used the word *stated*, and italicised it instead of *settled*.

Art. 3. *Con.*

18 Johns R. 346.

§ 2. *con.* Presumption of marriage arising from cohabitation may be rebutted by after separation; as where a man and woman cohabited two years as man and wife, and then lived separate forty years, without making any claim on each other.

2 Nott & Mc Cord, 114—115.

Living together as man and wife appears to be admitted as evidence of marriage generally; further cases 1 Har. & Mc Hen. 152; 1 Taylor 121; 2 Hayw. 3; 2 Nott & McCord. 114; 3 Marsh 379. Demaresly *v.* Fishly, 3 Marsh. 370, &c. marriage is a civil contract, and to render it valid, it is only necessary the parties be able and willing to contract, and do actually contract: 2. A marriage *de facto*, though not *de jure*, is valid, in most cases, as it relates to personal matters and causes: 3. Though cohabition is necessary to render a marriage valid when entered into *per verba de futuro*, yet it is not so when the marriage is *per verba de presenti*.

16 Mass. R. 157—161, Medway *v.* Needham.

§ 19. *Marriage in another State, how valid.* *Assumpsit* for pauper expenses. The question was on the validity of a marriage of Coffee and his wife, the pauper. He was a *mulatto*, and she a *white* woman, inhabitants of Massachusetts Bay, when married, and before the year 1770. Her laws forbid such marriage; they went to Rhode Island and were married there ac-

cording to the laws of that province, which did not prohibit such marriages. II. Ch. 46. *Art.* 3. *Con.*

Held, a valid marriage—and, generally, a marriage valid in the country where solemnized, is valid in other countries. Though it should appear the parties went into another State to contract such marriage, with a view to evade the laws of their own country. But the principle will not extend to legalized incestuous marriages so contracted.

§ 20. *Assumpsit* for pauper expenses of two children. Their father, Bemis, was divorced *a venculo*, for his adultery, from his first wife in this State : He married his second wife, the mother of said children, in New Hampshire, where the marriage was legal, though his first wife was living. Held, this second marriage was valid in Massachusetts, but had been void if here solemnized. *Quere*, if he was punishable for polygamy. 1 Pick. R. 506-512, Commonwealth *v.* Spencer.

§ 21. A having been ordained a minister of the gospel according to the forms of the Baptist churches, and being afterwards engaged by two Baptist societies in the town where he lives, to preach to them alternately, half the time to each, is a stated minister of the Gospel, and a marriage by him is valid; so of a Methodist minister ordained and afterwards settled in any town for two years, according to the usage of that sect. 1 Pick. R. 235, 236.

§ 14. The decision has been called in question, and C. J. Parsons's opinion pronounced inaccurate, that is Milford *v.* Worcester. Art. 5. *Con.*

§ 1 *con.* The court will not grant a divorce for the adultery of the wife procured by the husband, and 3 Greenl. 35, there must be evidence of the marriage though the husband do not appear; page 136, if for adultery, there may be proof the injured party has forgiven the offence by subsequent cohabitation; and 1 N. H. R. 198, wife petitions for a divorce, where her husband has been absent 3 years, and has not provided for her support, it must be proved he has property sufficient, &c. This divorce too is *a vinculo*. Art. 9. *Con.* Pick. 299, Pierce *v.* Pierce.

§ 14 *con.* Held, a court of chancery has power to grant *alimony* to a wife in Virginia, even without a contract for separation, where the misconduct of the husband is such as to render it unsafe for his wife to live with him, or he turns her out of doors, without a support, and this on general principles, there being no Ecclesiastical court or statute on the subject in the State. A final decree of divorce a *mensa et thoro*, is not made till the real facts of the case are first ascertained. 4 Rand. 662—668, Almond *v.* Almond. 1 Hop. Ch. R. 118.

The laws of England as to divorce have never been adopted in N. York. Her statutes as to it, are original regulations. Chancery in New York, has no power to dissolve a marriage or to decree a divorce, for the cause of corporal impotence. See Art. 1, s. 4. No law in New York authorizing a divorce till 1 Hop. Ch. R. 568, Burtis *v.* Burtis.

I. Ch. 46. *Art*, 9. *Con.*

March 13, 1787, and that only for adultery, till April 9, 1819, when the legislature made a new and extensive provision as to divorces in specified cases, not including divorces for impotency.

1 Hop. Ch. R. 584–586, Paff *v.* Paff. A divorce directs the husband to allow for the maintenance of children till further order. A new bill to vary allowance cannot be filed without the Court's order: 2. Applications to vary such allowance are made by motion or petition.

5 Pick. 461—469, Dean *v.* Richmond.

§ 29. *Assumpsit* on a promissory note dated May 2, 1825, made by the deft. to the plt. for $600 interest, and $100 of the principal, to be paid yearly. Nov. 28, 1824, the plt. intermarried with Ebenezer Dean, and May 2, 1825, when they were married, she was seized in her own right of certain real estate. This May 2, 1825, she and her husband conveyed to the deft. for a part of the consideration, said note was given, and the husband agreed she should retain it as her property, and receive the payments to her separate use, and she ever retained it. April term, 1826, she was divorced from *bed and board*, &c. Held, 1, a wife so divorced may sue or be sued as a feme sole for property acquired or debts contracted by her, subsequently, to the divorce: 2. The court has no authority on granting a divorce, *a mensa et thoro* to secure a restoration to the wife of the personal property that belonged to her at the time of the marriage: 3. Such a divorce does not affect the right of the husband to reduce into possession choses in action that belonged to the wife prior to the marriage. Plt. non-suited. The decree, Dean *v.* Dean, p. 428; is void as the personal estate.

CHAPTER XLVII.

MASTER AND SERVANT.

Art. 1. *Con.* 4 Pick. 425—428.

§ 3 *con.* But no action lies for inducing a servant to leave his master's service when the time for which he has hired himself shall have expired, though he had, previously, no intention of quitting such service.

Art. 3. *Con.* 17 Mass. R. 98—102, Williams & al. *v.* Mitchell.

§ 7. If my general agent take up goods often of A, and I pay for them, I am liable, though such agent in one case take goods of A, saying they are for me, by a *forged* order, and convert them to his own use. As where one Allen applied at the plt's. store to buy goods for the deft., on six months' credit. *The plt. required an order from the deft., in writing, for the goods.* Allen afterwards produced one and received the goods, and converted them, &c. The order was forged. Plt. brought *assumpsit* for the price, and added the money counts, and was permitted to prove Allen the general agent

of the deft., and that he had often paid for goods taken up by Allen, on the deft's. credit, and for his use. Judgment for the plt. But did not the plt's. requiring the written order prove he did not recognise and trust Allen as the deft's. general agent on that occasion? As on it the plt. adopted a new course, was it not presumable they had learnt Allen was not to be trusted? and did not the plt's. requiring the order show they no longer considered Allen the deft's. general agent, and therefore required a written order, a special authority? No doubt they had a right so to consider the case.

It is clear the plts. did not give the credit on the general agency, but on the forged order: they required an order, and it was their duty to see it was a forged order, and to reject it. They were the negligent party. It does not appear in this case, as stated, that Allen ever was employed by the deft. as agent between *him and the plts.* Now I may give my servant or agent credit at the shops of A, B, C, D, and E for various reasons, and so far make him my agent, but this by no means authorizes F to trust him: so is every day's practice, and the authorities; and did the evidence prove Allen was the deft's. agent further than between him and the persons the deft. had dealt with by Allen? The verdict found Allen 'was the *authorized* agent of the deft.' to purchase any articles of merchandise for his shop in Bridgewater. This verdict left the evidence as it was as *to the person of whom he was to purchase.* It did not find a *general* agency as to persons to buy of. I see no evidence Allen had any agency to buy of the plts. or that the deft. trusted *him as to them*, though he did as to others. A may keep a shop and B may be his authorized agent to buy goods for it of C, D, E, F, G, and H, and yet not of L, M, or any other person but those A has in fact dealt with by B's agency. It was clearly essential to the plt's. recovery that the deft. should have made Allen his agent and trusted him *quoad the plts. themselves.* This fact does not appear. Possibly it may have been proved.

Art. 5. Con. 18 Johns. R. 169, Chapman v. Butler.

§ 10 *con.* The mortgagee *in possession* is liable to the master for his wages, if the voyage be performed for the benefit of the mortgagee. Otherwise, if the master contract with the mortgagor, and the mortgagee has no real interest in the voyage; and a mortgage may be proved by parol evidence, where the bill of sale, on the face of it, is absolute. See the liability of the mortgagee to pay for repairs or not, or to pay wages, &c. or not, well considered, Abbott on Ship, by Story, A. D. 1829, pp. 18, &c.; and 15 Johns. R. 298; and 7 Cowen R. 697, Thorn *v.* Hicks. The main question in these and similar cases, to whom is the credit given? And

II. Ch. 47. *Art.* 5. *Con.*

2 Bing. R. 179; 1 Payne & Carr. R. 602; 1 Wash. Car. R. 226.

§ 24. The master contracts to carry goods on freight and is prevented performing by the blockade of the port, if entitled to compensation, his only remedy is an action on the case. Stoughton *v.* Rappalo, 3 Serg. & R. 559.

§ 25. *The owner is not liable*, &c. Where a ship is put up not as a general ship, but is employed by the owner on his own account, and the master receives A's goods on board, as a part of his *privilege*, receiving to himself the freight and commission. The owner in this case is not liable for embezzlement, or for the conduct of the master in relation to the goods he so receives.

King *v.* Lennox, 19 Johns. R. 235.

Gibbons *v.* Morse, 2 Halsted, 253--271.

§ 26. Held, 1. If the owner of a ferry carries, or allows a slave to be carried away in his boat, he is liable to pay the value of the slave if the slave do not return: 2. The owner of a passage boat, who has the management of it, who advertises for passage and receives the passage money, is liable for all unlawful acts and misdemeanors and negligences of the hands on board, in the ordinary course of business, and especially for all wrongs and injuries done to third persons, notwithstanding any private order or covenant between such owner and his hands: 3. Master is liable if the slave enter by stealth and conceal himself, so as to be discovered in the usual management of the boat: 4. In New Jersey all black men are presumed to be slaves until the contrary appears. Many cases cited, all English nearly.

Stooker *v.* Corlett, 1 Cons. Rep.

§ 27. The master ordered A to build a boat for a ship he commanded, the owners living in the place, and A charged the price to him and them; but when he gave the order he did mention or state who were the owners. Held, he and they were all liable.

1 Cowen, 293-309, Muldon & M. *v.* Whitlock and others.

§ 28. *Assumpsit* for stores furnished by the plts. for the ship Cadmus, owned by A and B, partners, and C and D, partners. The plts. sold the stores to A and B, ships' husbands, on four months' credit. The plts. first charged the stores to all the owners by name. A few days after the sale, the plts. rendered two bills to A and B, charging *them only*, and about two months after the sale took their note at an extended credit of eight months, receipting for the note as full payment for the stores. A and B failed. Plts. recovered, C and D not being discharged, being once liable. They were not discharged by the delivery of said bills, or the taking of said note, that not being satisfaction till actually paid. Duties, &c. of ships' husbands examined; but had C and D been injured by said transaction they would have been discharged. But were not C and D injured by the plts'. giving A and B credit

Art. 5. s. 19

till they failed, and so fixed the whole debt on C and D, whereas but for such long credit they might not have been held but for a moiety. Do ship owners give power to the ship's husband, then, to vary contracts after they are once made in the usual course of business? There is no case cited or found to justify a ship's husband or a partner to give such a note in such circumstances, and thus to vary the original contract made with the owners, or contractors, without their consent. Owners are sureties for each other; if one pays more than his part there is contribution. Such an extent of credit to the debtor till he failed, always discharges the surety, or if the principal fail and two sureties become liable to the creditor and he extends credit to one in such manner till he fails pending the extended credit to him, the other surety is discharged. See ch. 169, and other cases. And was not the question, whether injured or not, clearly a jury question? The note postponed the first payment. See ch. 165. a. 3. s. 6. Vol. 5. II. Ch. 47. *Art.* 5. *Con.*

§ 29. Masters and owners of vessels on the high seas are not *common carriers*, so as to be liable to all losses or injuries that arise from any other cause than the act of God, or the enemies of the country: 2. In an action against the master or owners for loss or damage of goods for other cause, it is to be submitted to the jury, on the evidence, whether they used ordinary care and diligence. Astor brought *assumpsit* against A and A, for the value of certain bear skins, shipped on board the vessel of A and A, at New Orleans for New York, which were destroyed by *rats* on the voyage: not a sea peril. Aymer & Aymer v. Astor, 6 Cowen, 266-269, error from the common pleas.

CHAPTER XLVIII.

MINISTERS AND RELIGION.

§ 8 *con.* On the whole, if our system taxes the Jew, Catholic, or Hindoo, to support the Protestant religion, and leaves either to pay his own teacher besides, it so far agrees in principle with the English system, by which dissenters and Catholics pay tithes to the established church, and maintain their own ministers besides.

§ 11 *con.* As recently as 1828 it has been contended in vindication of each gathered church, that it is a *body politic;* and that it retains, under the old colony and province laws, its first and separate vote in the election and settlement of a minister; and that the decision in Avery's case is erroneous, wherein it is held, the parish has, by law, *the exclusive right to*

II. Ch. 48. *elect and contract with him.* This is indeed strange, as these old laws are all so expressly repealed by the statutes of March 4, 1800, and June 18, 1811. Equally singular that any one should urge the church can choose a *pastor* and the parish a *minister*. It is conceived that though the church could so elect under those old laws, yet it never was so a *body politic* as to sue and be sued, make a money contract, or vote, assess, and collect a tax, clearly not after 1662, when church members alone ceased to be voters and others became voters too. In advocating the ancient power of the church, despotic till 1662, the power of the *town* has, by mistake, been ascribed to the church, as in the case of one Briscoe of Watertown, A. D. 1642, who was taxed towards the minister's salary, and complained and wrote against the tax. Governor Winthrop and Hubbard speak of it as a tax voted and assessed by the *church;* but it seems now, on examining the Watertown record, it was a tax voted by the *town*, in a town meeting, in which town officers were chosen. As then only church members were voters in town meetings, Winthrop might not be attentive to distinguish the acts and votes of the *town* and those of the church; and as he confounded them in Briscoe's case it is probable he did in other cases. I have never seen the least evidence that a *church, as such*, ever exercised *civil* power as a *body politic*, as to sue or be sued and defend, or to use a seal, to make money contracts, buy or sell land, or vote and assess taxes. No doubt church members alone voted the tax in Briscoe's case, because then they alone were voters in any case. Though the church, *as a church*, had power to act *by vote*, it was only in church order and discipline, but whenever they acted in matters of *property* and *civil* rights, they acted and voted as a *town*. But most clear it is, that whatever the church, *as such*, might do under those old laws, is now of no importance, as those old laws have all been actually repealed, and new laws enacted on the subject in conformity to the constitution of 1780.

1 Greenl. 102-111, Baldwin v. Mc Clinch.

§ 12 *con. Who is a minister of the gospel.* A person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist episcopal church, is *such minister*, within the meaning of the statute of 1811, c. 6, though he have no authority to administer the sacrament of the communion: 2. It is sufficient he be settled over a religious society, though composed of members residing in different towns: 3. Not necessary it be legally bound, as such society, to pay him any fixed salary. Who is a *settled ordained minister* to marry, see Marriage, ch. 46. a. 2.

§ 14 *con. Assumpsit* on the following note of the deft's.

testator: 'Dedham, June 1, 1811, borrowed and received of Willard Gay, esquire, treasurer of the third parish in Dedham, seventyfive dollars, which sum I promise to repay him, or his successor in said office, according to the conditions of a donation made to said parish, and accepted by them, by a vote passed May 30th 1811, and recorded in the parish book of records, reference thereto being had, with interest on the first day of March, annually.' Held, 1. This was a valid note: 2. It is legal for several of the inhabitants of a parish by subscription to create a fund for ever for parish purposes to be managed by trustees: 3. There was a good consideration stated in the note: 4. That this the deft. could not contradict: 5. That the parish had a right of action in this form in the name of the treasurer for the time being: 6. That the trustees, in case of neglect, may be compelled by a bill in chancery to appropriate the fund according to the intentions of the donors. 8 Pick. 322—325, Fisher, treasurer of the third parish in Dedham v. Ellis, ex'r.

§ 21 *con. Lands granted to future pious uses*, remain in the grantors till, &c.; as where three proprietors in 1780, granted three hundred acres of land 'for the sole use and benefit of the gospel congregational ministry, for the sole use of the ministry, so soon as there shall be one ordained and settled properly in that part of the town which lays, &c.' meant as a parsonage, &c. Held, 1. The right to the possession remained in the grantor until such ministry came into existence: 2. If a disseisin, in the mean time, the said proprietors could maintain a writ of entry, counting, generally, on their own seisin: 3. But they could not resume the grant, nor could they alienate the lands without such consent as is necessary for the alienation of other church property: 4. In a real action the tenant is not admitted to show a title in any person other than the demandants, unless he can derive title from such person to himself, by legal conveyance, or operation of law. The great principle truly and correctly held, was, that the fee remained in the proprietors, the grantors, and not in *abeyance*, till there should be a parish and a congregational ministry to take. See Abeyance. 1 Greenl. 271-292, Shapleigh, proprietors of v. Pilsbury.

§ 22 *con.* In January 1816, the plt. left a congregational society in Lancaster and joined a Universalist society; on this act of June 18, 1811, decided he was not liable to be assessed in a tax granted by the parish for the payment of a debt incurred under a vote of it before he separated from it. By this statute he could not be taxed after he obtained his certificate prescribed by it. 17 Mass. R. 347—349.

As the law was, before the main stat. 1821, ch. 135, every person resident within the limits of a *territorial* parish, if oth- 2 Greenl. 67-72, Lord v. Chamberlain

II. Ch. 48. erwise qualified, was *ipso facto* a member of the same, unless he was regularly united, as a member, to some *poll parish*: 2. On ceasing to be a member of such *poll parish*, he immediately becomes a member of the *territorial* parish within which he resides, unless such secession be *colorable* and *fraudulent*. The law is still such in Massachusetts; Lord's *fraudulent* intention was in seceding from a Baptist poll parish, and rejoining the territorial parish, to dissolve it, and transfix its lands to the town of Lebanon; this he declared to be the intention of himself and others. As his intention was fraudulent, his secession was not effectual, but he remained a member of the poll parish.

§ 27 *con. Assumpsit for money had and received against a parish*, tax being void.

4 Pick. 361—365, Sumner v. First Parish in Dorchester.

Plt. was a member of the Brattle Street Society in Boston, and had an estate in said parish in Dorchester, and became a resident on it, was assessed in 1824, $49,53, goods sold, &c. and money paid into the parish treasury. Held, 1. He having on stat. 1811, ch. 6, filed a certificate with the city clerk of Boston, of membership in said society, obtained April 22, 1822, from its committee, and removed to Dorchester, before passing the statute, 1823, ch. 106, was not obliged to file a certificate under said statute with the clerk of the oldest society in Dorchester, in order to exempt himself from taxation by that society: 2. The tax levied by it on his property might be recovered back in this action. This stat. 1823, ch. 106, was enacted Feb. 16, 1824.

4 Pick. 393—405, Gage v. Currier & al.

Trespass against assessors of the 4th religious society in Newburyport, for illegal tax on the plt's. pew, and on his poll and estate, he not being a member, &c. Held, they were liable in trespass, they not being within stat. 1823, ch. 138, s. 5, that provides in certain cases assessors shall be responsible only for their own integrity and fidelity: 2. Where a person separates from one religious society and joins another, filing with the clerk of the society left, a certificate of the facts under the hand of the clerk of the society he elects to join, is conclusive evidence of his having ceased to be a member of the former society: 3. A limited privilege granted by a special statute to a few individuals, is merged in more enlarged privileges secured to all the inhabitants of the Commonwealth, by a subsequent general statute, as that of Feb. 16, 1824, (ch. 106) the second section in which provides that 'any person may separate from one religious society and join another, either of the same, or of a different denomination, by filing with the clerk of the society left, a certificate of the fact, under the hand of the clerk of the society which such person elects to

join.' The same section further provides that 'any person who may come to dwell in any town in this Commonwealth, shall be deemed and taken to be a member of the oldest religious society in said town, unless such person shall, previous to the first day of May following, file with the clerk of such religious society, a certificate that he or she has joined him or herself to, and is a member of some other religious society within the Commonwealth, under the hand of the clerk thereof.' The third section provides that 'it shall be the duty of the assessors of every parish, precinct, or religious society in this Commonwealth, in assessing or levying taxes for the support of public worship, and all charges incident thereto, to assess all the property both real and personal, (not exempted by law from taxation) of all the members thereof, wherever the same may be situated, within this Commonwealth,' and his property can be taxed in no other religious society. The act February 21, 1824, (ch. 138) s. 5, makes all assessors liable 'only for their own integrity and fidelity,' 'but the liability, if any, shall rest solely with said city, town, district, parish, or religious society.'

§ 32 *con.* And this first parish succeeds to all the parochial rights the town had; as where lands were granted to the *town* of Winthrop, for the use of the *ministry*. By a resolve of the legislature, the lands were sold and notes taken to the town, to apply the interest yearly, to the use of the ministry; afterwards a poll parish was formed in the town, whence the residue became a district, and the first parish. Held, this residue, then the first parish, succeeded to all the parochial rights and duties of the town, and recovered of the town the monies and interest arising from the sales of the lands. First parishes so formed on Mass. stat. 1786, ch. 10, s. 5; and a poll parish is sufficient. Minot *v.* Curtis & al. ch. 59, a. 9, s. 9; 4 Pick. 222—227.

Trespass for breaking the plt's. close, &c. Held, the deacons of the societies of the *Shakers* are capable of taking and holding lands in succession, within the meaning of said act of February 20, 1786, (ch. 51), and Maine act, 1821, ch. 135; allowed to amend and declare as deacons and overseers, &c. Members made witnesses by releases as to damages and costs in the action. 3 Greenl. 243-25, Anderson & al. *v.* Brock.

§ 43. In Maryland, all religious sects, by the form of government, being Christians, are put on an equal footing, and equally protected in their religious liberty, and Christianity is the established religion; and every endowed minister of any christian sect, wrongfully dispossessed of his pulpit, may have a ***mandamus*** to be restored to his functions, and to the temporal

II. Ch. 48. rights with which he is endowed. 4 Har. & M'H. 429–456, Runkel *v.* Wenemiller: see the form of the writ from the General Court, and all the particular proceedings.

16 Mass. R. 488–522, Baker & al. *v.* Fales.

§ 44. This was an action of replevin, by the plts. as deacons of the first church in Dedham, to recover sundry bonds and other securities for the payment of money, together with the records and documents of the said church. The points decided were, that replevin lies for an unlawful *detainer only:* 2. Where the members of a congregational church separate from the *majority* of the parish, the members of the church who remain, though a *minority* of it constitute the church in such parish, and retain the rights and property belonging to it. Parker, C. J. in about thirty pages, as reported, examined very fully all the first principles of our parish system.

16 Mass. R. 457.

§ 45. One's being assessed in the last parish tax, the amount required by the stat. 1786, ch. 10, is the only evidence of his right to vote in a parish meeting.

17 Mass. R. 435–439, Gay *v.* Baker.

§ 46. Trespass for taking down the plt's. pew in the first parish in Dedham; facts agreed. The parish, by a committee, proceeded regularly to take down all the pews; each pew was appraised, &c. The parish was ready to pay the plt. the appraised value of his; the court decided, 1. A parish is the sole owner of the soil under their meetinghouse, and of the building: 2. A pew holder has an exclusive right to occupy his pew: 3. He may have trespass or a writ of entry against any one who disturbs him in it: 4. The parish may, when necessary, take down the house and rebuild on the same ground: 5. May alter the form of it to make it more convenient: 6. If in doing this the pews are destroyed, the parish must provide an indemnity for the pew holders, on just and equitable principles: 7. It is a necessary condition of the property in a pew, that it shall be subject to the regulations of the parish for useful purposes. The stat. of 1817, ch. 189, seems to have affirmed these principles. 1 Pick. R. 102–105: same principles in substance. Pages 91–102, Milford *v.* Godfrey & al.: where an ancient precinct may reorganize themselves, and lawfully pull down their ancient meetinghouse, though the town had possessed it quietly 35 years. There was some evidence, not much, the town possessed as the agent of the precincts, and at times, recognised its rights.

1 Pick. R. 169.

§ 47. Where a parish has built a meetinghouse and sold the pews, an execution against the corporation cannot be extended on the pulpit, it goes with the pews, &c.

16 Mass. R. 213–215.

§ 48. Plts. in error, assessors of the first parish in Dracut, assessed the lands of the deft. in error, lying in said parish, he being an inhabitant of Methuen; on the statute June 18, 1811,

(ch. 6.) Held, the assessment was well made, and that the lands of non-residents were within the act. The tax was levied by distress, and the deft. in error, original plt. brought trespass. Assessors justified as such; plt. replied below he was a member of a regular Baptist Society in Mathuen, a *different sect*, and show a proper certificate filed. Deft. demurred, and he had judgment in the common pleas. Assessors brought error, and it is said, judgment affirmed; must mean reversed.

§ 49. Manufacturing corporations are not liable to be taxed for their personal estate or stock, employed by them in the towns where their manufactories are established, to the parishes, or in other manner. See Salem Iron Factory Company *v.* inhabitant of Danvers. 17 Mass. R. 461-463.

§ 50. Under statute 1811, ch. 6, s. 2. a person may leave one religious society and join another of the *same* denomination, and filing a certificate in pursuance of the act, is exempted from taxation in the society he leaves. It had previously been decided this act is constitutional, so the important doubt, previously, removed. 1 Pick. R. 248—261, Holbrook in error, *v.* Holbroook & al.

§ 51. Trespass *de bonis asportatis* against assessors of Granby. Justification as such in 1822, goods distrained, &c. Held, a person ordained as a congregational minister in Connecticut, dismissed in regular standing, and installed over a town in this State, is within Massachusetts act of 1821, ch. 6; exempting settled ministers from taxation. 2 Pick. R. 403—411, Gridley *v.* Clark & al.

§ 52. Facts agreed; and held, land given to a town for the use of 'the ministry,' may, with the leave of the legislature, and consent of all parties interested, be appropriated to the support of several ministers settled over distinct parts of the *same* town—supposed the donor's purpose is preserved. The donation was general to the use of the ministry, including any christian ministry;—in fact, for the benefit of the christian inhabitants within the bounds of that township; and the new appropriation was so in reality, varied in form only. 3 Pick. R. 58-67, Humphrey *v.* Whitney.

Held, a parish may receive and hold property for the support of *schools*; so is Massachusetts statute 1789, ch. 19, s. 5. 3 Pick. 232-246, First Parish in Sutton *v.* Cole.

§ 53. A parish has a right to take down a meetinghouse in order to rebuild, without conforming to the act of 1817, ch. 189, which is intended only for *proprietors of* churches. 3 Pick. 344—347.

§ 54. In Maine, a town in which there is no parish, can vote and raise taxes for religious instruction. 3 Greenl. 88-91, Alna *v.* Plumer.

§ 55. Decided, that the title to lands, given to towns for the use of the ministry, is not regulated in New Hampshire by statute; and when a new town is formed by part of an old one, and such lands fall within the new town, it acquires only jurisdic- 2 N. H. Rep. 20-510, Baptist Soc. *v.* Wilton.

II. Ch. 48. tion, and not title to them. Also held, a person belongs to the ministry, who has once been admitted to preach, according to forms of the sects to which he belongs; and if he has been once ordained according to the same forms, he remains a minister till disfranchised, whether settled or not over any particular parish or society. Held, if lands given to a town for the use of the ministry, be afterwards sold by the town, the town, as a civil corporation, has the control over the funds, and is not liable for any part of them in an action by a religious society within the town.

p. 269, Londonderry v. Chester.

pp. 509–515, Baptist Soc. v. Wilton.

§ 56. In New York, Synod's decision final. The *classes* of M. deposed W., a minister of that church at C., for immoral conduct. He appealed to the *Synod*, (the highest tribunal of the church;) this reversed the decision of the *classes*. Held, this reversal was final; and all the classes did afterwards, did not affect the case. W. was restored to the ministry. Hence D., who subscribed a certain sum for the support of the minister of the Church at C., 'as long as W. remained the regular minister,' was liable to pay the amount of his subscription.

Dieffendorf v. the trustees of the Dutch Reformed Church. 20 Johns. R. 12.

As to religion in Virginia; 9 Wheat. 445–469, Mason's case. The powers of the vestry, &c., as to title to lands.

§ 57. *Assumpsit* for a year's salary, ending Sept. 24, 1826; also $4000 money had and received: plea general issue: plt. was ordained Sept. 24, 1800: he had a stated salary, but raised from $350 to $500: points decided; 1. If the parish exclude him from the meetinghouse, it is sufficient he preaches in private houses: 2. A devise of land towards the support of public worship, for the benefit of the inhabitants of a precinct; the estate to be leased, and the yearly income to be paid to the minister. On his ordination they vote him a fixed salary and increase it, and he receives it many years, making no claim to the devise, though exceeding the salary. The devise was to them, and he had no title to the income. 3. As to the dissolution of the contract, see Fuller *v.* Princetown, &c. above; parol evidence admitted to prove he gave up said income. 4. After they voted to dismiss the plt., they could not introduce evidence of his misconduct, not made the ground of charge against him in the vote of dismissal, for *gross* immoralities, without a council.

5 Pick. 469–479. Thompson v. the Catholic Congregational Society in Rehoboth.

CHAPTER XLIX.

OFFICERS' FEES, &c.

§ 9 *con.* Held, 1. Naval, and other officers in public trust, cannot legally make contracts for their private advantage: 2. 'An officer of the navy cannot bargain to discharge a public

1 Hop. Ch. R. 11-26, Weaver v. Whitney & al.

duty, for a private reward,' as to receive a reward for protecting private property on the ocean, &c.: 3. Such an agreement is corrupt and void, and a fraud on the United States and other nations: 4. Contrary to the twentysecond article of the navy regulations; 5. And, generally, when the law of the land fixes a compensation for public service, it excludes, necessarily, all other compensation: 6. No contract made in violation of the law to which the parties are subject, is valid.

§ 12 *con. How a referee must sue for his fees. Assumpsit* for fees. Held, 1. Referees need not join in an action for them: 2. An action by one, lies, not against the parties *jointly*, but must be against the person or persons making the demand: 3. If two be sued on a *joint* promise, and one alone appears, the general issue is, that *he and the other deft.* did not promise, &c. In judicial proceedings it belongs to the plt. to advance fees. 2 Greenl. 361-364, Butman in error, v. Abbot.

The sheriff cannot assign fee bills to his deputy, or to any other person, so as to enable the assignee to sue in his own name. Jones v. Commonwealth, 2 Litt. 359.

§ 14 *con.* Decided it is no defence in debt on the fee bill, (sect. 66,) that many other officers of the same county, habitually received greater fees than those the deft. has taken, &c. Mass. R. 410-412.

Debt on statute 1795, ch. 41, for penalties. Held, an officer does not incur them by taking fees on an execution not served: 2. Penalty is incurred if he takes as compensation for extra trouble, greater fees for levying execution than the law allows: 3. In an action on the statute, evidence of a usage to take such extra fees is inadmissible. 1 Pick. R. 171-177.

A constable to entitle himself to his fee on an execution, must levy the money, except where he is prevented by the plt's. act, or by operation of law: 2. The same law that governs sheriffs in the execution of process from the higher courts, governs constables in the execution of a justice's process, except where some statute intervenes: 3. If so prevented by the plt., he may recover his fees though he has only levied and not sold: 4. Must levy and sell in due time: 5. If no bidders attend, must postpone the sale, and notify the plt. who ought to attend and bid himself. If he do not, the constable is excused in returning the property remains for want of buyers: 6. (Material) so excused in so returning, if he cannot sell '*but at a great sacrifice:* 7. Yet after this, he must proceed to sell the first opportunity, and if he do not sell within thirty days, he loses his lien, as against other executions. Thirty days to sell is by statute. Cases cited; 4 Mass. R. 413; 1 Caines. 192; 1 Cowen, 256: 5 Johns. R. 252; 3 Camp. 524; 1 Bos. & P. 359; 13 Johns. 249; 14 id. 223, &c. 2 Cowen, 421-424.

§ 35. The parents of a child, a few years old, died, and left [illegible] some property, but no executor, nor person to take care

II. Ch. 49. child. A poor woman took the child and supported it a year; then administration was granted on the estate. She recovered of the administrator for her expenses and trouble, as her poverty rebutted the presumption of a gratuity, and the court thought the policy and humanity of the law was in her favor. Seems to be a just judgment, though a new case. The deft. made no express promise, nor the father any, nor did the law raise any implied promise by him nor by the administrator; no previous or subsequent assent appears on his part. It not being gratuitous on the poor woman's part, did not take this case out of that of Jones and Wilson. In fact, the poor woman's case seems to have been a righteous one, but *sui generis*.

§ 36. *No implied promise against express dissent:* as where the party attempted to be charged, expressly protests against being charged, the law raises no implied promise, or where the party attempted to be charged as a county, with expenses of a road, &c., and the sessions of the county expressly direct the expenses to be paid by the petitioners who were the commissioners of the government for the road from Maine to Lower Canada. The case in principle was, A employs B to perform a service, and at the same time, tells him he must look to C for payment. B makes no objection, and performs the service. C refuses to pay, and B sues A and is nonsuited. B may see to his pay before he performs the service. See Whiting *v.* Sullivan, ch. 9, a. 22, s. 4.

2 N. H. Rep. 288. Walker v. Ham.

§ 37. A penalty is not incurred by an officer, if he take a compensation for services not specified in the fee bill: 2. But if excessive fees are taken in any case, *assumpsit* lies to recover back the excess.

2 N. H. Rep. 202.

§ 38. An election to an office is the essential part of the appointment; but to fill the office there must be an acceptance of the trust, and in some cases an oath of office taken: 2. Once filled, is not vacant till the legal term of service is expired, or till death, resignation, or removal of the incumbent: 3. Those who appoint or recognize a person as an officer, are estopped afterwards, to question the legality of the appointment. The sale of the office of constable, or any other public elective office, is contrary to sound policy, and a notice executed for the price is void: 1 Serg. & R. 505; 4 do. 291; no fee but in the fee bill.

Johnson v. Wilson & al. p 517. Meredith v. Ladd.

CHAPTER L.

ORDERS, CHECKS, &c.

1 Mason, 328-340, Cremer v. Higginson & al.

§ 6 *con.* December 15, 1808, Stephen Higginson & Co. wrote a letter to Thomas and Adrian Cremer, Rotterdam,

saying 'our friends and connexions Messrs Stephen and Henry Higginson, contemplate, under certain circumstances, making a considerable purchase of goods on the continent, they wished to obtain a letter of credit from us to increase their means, and to be used or not, as circumstances may require. As we are now indebted to you, and have no funds on the continent of Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would be disposed to furnish them with funds under our guaranty. The object of the present letter is, therefore, to request you, if convenient, to furnish them with any sum they may want, as far as $50,000, say $50,000. They will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in the case; we shall hold ourselves answerable to you for the amount.' Held, 1. This was not an absolute original undertaking, but a *guaranty*: 2. That it covered advances only to *the two partners*, on partnership account, and not any to either of the partners *separately*, on his *separate* account: 3. The guaranty ceased on the dissolution of the partnership, and after notice thereof, no advance made, charged the guarantors: 4. The guaranty authorized but one advance of $50,000 in all: 5. As to applying payments, the common principles: 6. When money is advanced to a partnership under guaranty, and that is dissolved, and the debt is then carried at their request, to their separate accounts, and the creditor discharges the partnership account in the usual form, and no notice thereof is given to the guarantor, he is discharged: 7. If on a letter of guaranty addressed to A, he makes advances, A is bound to give notice thereof, in a reasonable time, to the guarantor, otherwise he will be discharged.

A guarantor is held, as is a surety, to nothing but what he assents to. It is clear in this case, the defts. never assented to the *separate* credits or advances, or to the extended credits.

§ 13 *con.* The deft. wrote on the back of a negotiable note, thus, 'I guaranty the payment of the within note, in six months, Thomas Little, June 3, 1817.' Held to be an absolute and original undertaking, hence his duty to see the maker paid it at the time due, or to take notice of his neglect, and pay it himself. Sometimes a guaranty is conditional, as in Tyler *v.* Binney, ch. 20, a. 21, s. 49, vol 1.

2 Greenl. 261—265, Cobb. & al. *v.* Little.

This was *assumpsit* on a promissory note payable to A or order on demand, signed by B, and endorsed in blank to C. The payee may sue C, as original promissor, or as guarantor:

4 Pick. 311—312, Sumner *v.* Gay.

II. Ch. 50. 4 Pick. 38–388, may sue C as guarantor, not as original promissor.

12 Wheat. 515-523, Drummond v. Prestman.

Case of guaranty. A letter written to one partner by a father engaging to guaranty promises of his son, construed to extend to the partnership, it being proved the transactions to which the letter related, were with the partners. A judgment against the principal, is evidence against the guarantor, that may be admitted to certain purposes. Green *v.* New River Company, ch. 90, a. 9, s. 2; Higham *v.* Ridgeway, ch. 81, a. 5, s. 16; 17 Johns. R. 134—326, due demand.

§ 16 *con. How the drawer's property in a check* may con-

1 Barn. & Cres. 5-6.

tinue. The deft. agreed to lend £200 to A and B for a specific purpose, and drew a check on his banker for that sum, and delivered it to them before they became bankrupts. They did not use it, but returned it to him *after* they committed an act of bankruptcy. Held, he retained the property of the

2 Barn. & Cres. 422.

check, and their assignees could not maintain trover for it. The same principle as to bills owned by A remaining in specie in his banker's hands, when they become bankrupts.

If A draw a check on his banker, and it is altered so as to increase the sum, and the banker pays the larger sum, he can charge A only the sum he drew for, though the alteration be so made as to escape notice, in the common course of business. 5 Barn. & Cres. 750–757, Hall & al. *v.* Fuller and others, the check was altered from £3 to £200, the plts. in account paid the £200, finding the error, sued, and recovered back £197.

Murray & al. v. Judah. 6 Cowen, 484—498.

Assumpsit on a check by the holders, against the drawer, drawn on the Phœnix Bank, payable to bearer, dated May 8, 1818, for $5000, money counts only; when drawn, Judah had in the bank about $500, and January 23, 1820, his account was closed with it. Held, 1. A demand of a check must be made on the drawee before the holder can sue the drawer: 2. No particular time for the demand is fixed: 3. Enough it be within a reasonable time: 4. As between the holder and drawer, a demand at any time before suit brought, is sufficient, unless it appears that the drawee has failed, or the drawer has, otherwise, sustained injury by delay. 3 John. Cases, 5; id. 259, Conroy *v.* Warren.

§ 25. *One guaranties half of a bill, &c. when notice is*

1 Barn. & Cres. 10, Holbrow & al. v. Wilkins.

not necessary. The plts. sold goods to Carter & Poot, and took their acceptance for the amount, half of which was guarantied for by the defts. Before the bill became due, C. and P. became insolvent, whereof the deft. was informed; and, also, that the plts. looked to him for the amount of his guaranty. Held, not necessary for the plts. to present the

bill when due, or to give notice to the deft. of the non payment of it; cited in point, Swinyard *v.* Bowes, 5 M. and S. 6; contra, Phillips *v.* Astling, 2 Taunt. 206; Murray *v.* King, 5 B. and A. 165. II. Ch. 50.

§ 26. A chose in action as a note, &c. cannot be taken in execution. A party may reverse his own judgment for error, as for too small damages.

§ 27. An order, made payable to A or B in the disjunctive, out of the proceeds of certain carriages, whenever they should be sold, is not negotiable, nor can A or B alone, endorse it; no partnership being averred, none can be presumed. In such case the plt. must state and show the original consideration of the order and the acceptance. De Forest *v.* Frary, 6 Cowen. 151—156.

§ 28. A conditional letter of credit to pay the insolvent's debts in a year, if all his creditors made arrangements with him, so as to free him for all. Held, no creditor could avail himself of the letter, but on condition he proved such an arrangement was made. M'Farland *v.* Smith, 6 Cowen, 669—672.

CHAPTER LI.

PARENT AND CHILD.

§ 12. *Minors enlisting as soldiers.* 1 Mason, 71, United States *v.* Bainbridge. Held, congress has constitutional power to enlist minors in the army or navy, without the consent of their parents. Art. 1. *Con.*

§ 19. *Assumpsit* for board and clothing furnished the deft's. minor son in the West Indies; plea never promised; and decided, if a minor son voluntarily leaves his father's house to seek his own fortune, or to avoid domestic discipline and restraint, the father is not bound to pay for his support. Verdict for the plt., new trial granted; was admitted the plt's. claim was equitable; and it seems he did not know the son's situation, and knew his father. The son was indicted for a felony and fled, and was in distress in the West Indies. This is an important case; no doubt law, but hard law on the plt., who, probably, had no means of knowing the facts in the case. It seems after the decision, the deft. paid the plt's. demands. Art. 2. *Con.* 16 Mass. R. 28–32, Angel *v.* M'Lellan.

CHAPTER LII.

PARTNERS AND PART OWNERS.

§ 2 *con.* See several partnership cases in equity, ch. 108, a. 5, s. 23, 24, 25, &c. on stat. February 10, 1818; February Art. 1. *Con.*

II. Ch. 52. *Art.* 1. *Con.*

21, 1824, (ch. 40.) This last provides for bills of discovery when property is secreted or withheld, and for settling disputes among partners, joint tenants, &c. Evidence that proves one a partner, &c., Gowan *v.* Jackson, 20 Johns. R. 176; 5 Barn. & Cres. 504.

§ 5. *How subscribers to an undertaking may be partners.*

1 Barn. & Cres. 74—76.

A number of persons joining together and subscribing sums of money, for the purpose of obtaining an act of parliament to make a railway, are *partners* in the undertaking, two of whom were the plt. and deft. The plt., who acted as their surveyor, sued the deft. who acted as chairman at the meeting, when the work done (was probably ordered), and the court said he might have pleaded that he undertook jointly with the other subscribers; that it is clear that one partner cannot maintain an action against his copartners for work and labor performed, or money expended, on account of the partnership. Hence the plt. cannot support this action against the deft. or against the body of subscribers at large. See ch. 42, especially a. 1, s. 7, and the word joinder in actions, in the index. Ch. 22, s. 32, seems contrary. 9 Mass. R. 300--303, Sproat *v.* Porter, and others. The exception does not appear to have been taken, that the plt., as a subscriber, was one of the promissors. 1 Barn. & Cres. 407; where one partner alone is liable, though he sign for himself and his partner.

Art. 2. *Con.*

§ 3 *con. One's private debt* is his alone, &c. *Assumpsit* against the defts. as endorsers of a promissory note, dated May 17, 1823, purporting to be made by Edwards & Coffin, payable to the defts. in two months, &c.; Edwards & Coffin were partners. Coffin made it for his own private debt, without his partner's assent, this, the person taking the note knew. Held, the other partner is not bound, nor the endorsers, without consideration, unless the holder proves they knew the circumstances. 'It is deemed fraudulent in the creditor of one of the partners to attempt to get security for his debt,' in a contract in the name of the firm. See a. 6, s. 18; s. 20, this art., and 19 Johns. R. 154.

2 Pick. R. 5 12, Chagournes *v.* Frost & al.

3 Pick. R. 177-179, Whitman *v.* Leonard.

If, after it is dissolved, one partner deal with A, who has no notice of the dissolution, this act of one applies only to transactions in the usual course of business. One renewing a note after the partnership is dissolved by the abandoning of the other partner, is not such a transaction, and the note does not bind the firm.

8 Serg. & R. 108.

If A and B purchase, not on joint account, but afterwards mingle their interests, in order to sell, they are partners from the time they so mingle their interests.

§ 5 *con.* 4 Barn. & Cress. 869. One partner can pawn the goods of the partnership.

4 Serg. & R. 356. Though the members of a banking association, not incorporated, promise to pay only, 'out of their joint funds according to their articles of association,' yet the members, as partners, are liable in their separate estates. Hess v. Wirt.

Where all the partners are liable, though the credit is given to one of them—as where A sells goods to one of them, in fact for the use of the firm, and charges the one only, not knowing the use, or of the firm's existence, held, all are liable. It was a special partnership in erecting and furnishing a mill, 1 Esp. R. 29; and 4 D. & E. 723 Saville *v.* Robertson, 7 Johns. 311; 1 Cowen 290; Doug. 371. Reynolds & al. v Cleveland & al. 4 Cowen, 282–291.

§ 11. Two partners, A & B. A gives a lease, sealed by his seal, and in words to bind him only. This is not admissible evidence to support an avowry laying the demise by the partners, though the deed be expressed as 'for himself and his partner,' and it is proved B knew of the demise and was satisfied with it. And if C buy B's share, C is not bound to pay any part of the debts *previously* contracted by the firm of A & B. 6 Munf. 418. One partner owes me a debt; I cannot set it off against one I owe the partnership. 1 Wash. 77, and 1 Hen. & M. 176; 5 Munf. 388. Tuttle v. Eshridge, 2 Munf. 330.

In equity a creditor may prove his claim due from a partnership, though he has taken the note from one of the partners, in his individual name. Against it a suit may be maintained in equity, if one of them be out of the State, though the remedy would have been at law, if both had been resident in the State. The goods were furnished *the firm*, for which the note was given and its debt remained. 1 Rand 300–305. Williams v. Donaghe's exrs.

The interest of each partner in the partnership property is his share in the *surplus* after the partnership accounts are settled; and that share only is liable to the separate creditors of each partner. 4 Johns. Ch. R. 522. 20 Johns. R. 611, was on appeal, Mumford's Cases. 19 Johns. R. 513, Skinner *v.* Dayton, one partner cannot, by deed, bind the others, but by their express authority. If without it, he makes himself liable *personally*, but it may be by *parol*, and if they, by their after acts, ratify the contract, they are held rateably for any damages that may be recovered, at law, against the partner or associate who made the contract. 20 Johns R. 611. 17 Johns. R. 357; 5 Johns. Ch. R. 351.

Further. A & B own a ship and cargo. A gets possession of all the proceeds. He may retain them till paid his advances beyond his shares for outfits, repairs, or expenses of the ship, for *that particular* voyage or adventure, but that only, not for any former balance arising in a former voyage of their's, even in the same ship, they not being general partners; each Mumford v. Nicoll, 20 Johns. R. 611.

II. Ch. 52. *Art.* 2. *Con.*

ture creates a special partnership by itself, and terminates with each voyage or adventure, contra the same case. 4 Johns. Ch. R. 522.

But one partner may sign a deed of composition, and release a partnership debt. Though one cannot bind another by deed to comply with an award, yet if one be made on such a submission, and he accepts the sum awarded in favour of the firm and endorse on the award, a receipt in full, the firm is barred. This operates as a *release* by one partner or as an award and satisfaction.

17 Johns. R. 58.

Buchanan v. Currey, 19 Johns. R. 137.

A & B are partners. A signs the partnership name to a note as *sureties* for C, not authorized by B. He is not bound, and the creditor must prove B. consented. A makes a note, and says *I promise* to pay, &c., and subscribes the partnership name, A & Co.; the firm is held not A alone. A note made by one partner in the name of the firm, is intended to be a note in partnership dealings. And if, in fact, for the debt of the one partner, it is matter of defence id.; the note of four partners is made to A, he gets judgment against two of them; this bars an action against the four.

Foot v. Sabin, 19 Johns. R. 154.

Doty v. Bates, 11 Johns. R. 544.

Robertson v. Smith, 18 Johns. R. 459.

§ 22. A & B, joint partners in a voyage, have a cargo. A sells it to C, and takes his notes therefor to A himself alone. A dies. B files a bill in chancery as surviving partner against A's executor, chancery will decree him to pay to B his proportion of the sales of the cargo, though A may not have left assets sufficient to pay his private debts decided in the court of chancery by the chancellor. 4 Har. & McH. 167 to 199, Ridgley *v.* Carey, executor. Partnership property is first to be applied to pay partnership debts, and private debts are postponed, id.

§ 25. A & B are partners in trade. A draws an inland bill *for his own* debt on the firm, and accepted in its name; no action lies against it. Where C is indebted to A & B, partners, and after a dissolution of their partnership, A is declared a bankrupt, and C after informed by an *unauthorised* person, pays the debt to A, the payment is valid: that is, informed of the dissolution and bankruptcy.

4 Har & Mc H. 350-351.

4 Har. & Mc H. 406,

§ 26. Two, A & B, once partners, sue. A agreed the action be discontinued. B makes affidavit that the cause of action is a debt, due to the partnership, and that A's agreement is to defraud B, by collusion between A and the deft. The court refused a nonsuit.

3 Pick. 403, Loring & al. v. Brachett.

§ 27. By stat. 1823, c. 140, one tenant in common or partner has relief in equity against the other. Yet, however, if the joint interest is determined or partnership dissolved, and all demands settled, and a balance is due from one to the other. *Assumpsit* lies for it, though there is no express promise, and if there be three or more partners, and one receives monies, the

3 Pick. 420—424, Fanning v. Chadwick, Jr.

property of all, and they settle accounts and he keeps back those monies privately, any other partner may have *assumpsit* for his part. Same principle as to tenants in common. See Wilby *v.* Phinney, admr. ch. 6, a. 2, s. 6, and Brigham *v.* Eveleth, 39, a. 7, s. 17, Vol. 2.

§ 28. If I have a claim against a mercantile company, I cannot set off such claim against a debt I owe to one of the partners. However I may charge him in equity, for so much of the *surplus* of the partnership property, as may be due to him on the settlement of the partnership accounts, for the purpose of which settlement, and also for that of ascertaining and adjusting his own claims against the company, all the partners must be made defts. in the bill, and after the firm is dissolved, one partner cannot bind the others by settling accounts. 4 Munf. 215.

Dunbar *v.* Buck, 6 Munf. 84.

§ 29. A & B, partners in trade. A gives a bond or note *without B's consent*, for a debt not due from the firm. B is not bound at law, nor will equity hold B bound on the ground A gave the bond or note for goods, most of which came to the use of the firm; the vendor having retained no lien on the goods.

6 Munf. 418.

§ 2 *con.* The partnership being dissolved by the death of one partner, the survivor assigned over the property of the firm, to enable him to take the benefit of the insolvent debtor's act. The firm being insolvent, the assignee sued the Union Ins. Com. for dividends on stock of the firm, which dividends accrued after the dissolution. The company offered to set off the amount of a bill of exchange, endorsed by the surviving partner after said dissolution, which had been discounted by the company and returned protested. Held, the set off was not admissible. The dividends were the property of the *firm*. The bill was the debt of *one partner*. The private debts of one partner cannot be set off against a demand of the firm.

Art. 4. Con.

1 Nott & Mc Cord 557—562.

2 Bay, 146.

The partnership funds must first be applied to pay *partnership* debts; if a surplus then to pay the private debts of each partner in proportion to his share in the funds.

1 Nott & Mc. Cord, 557.

After dissolution, &c., one partner cannot renew a note in bank, in the *partnership* name, though during the firm it wrote to the bank to renew within a time named, in which the renewal was, but after the dissolution. Held, here was no power to use the name of the firm, and notice of dissolution published in a Gazette taken by the bank, is sufficient notice to it, though the deft. had had dealings with it.

1 McCord, 388.

1 McCord, 16.

§ 9 *con.* Stock on a farm held by A and B jointly, A dies, his moiety goes to his representatives. 4 Har. & Mc H. 281.

§ 11. *A dormant partner.* A contracts to supply goods to B, *afterwards* C is let in to share with A, and aids in the supply and is paid, C is a witness for A against B: 2. Nor need

II. Ch. 52. *Art.* 4.

C be joined in A's action to recover payment: 3. If a contract in writing be signed by the party to be charged, it is sufficient to take the case out of the statute of frauds, though it be not signed by the other party seeking the remedy. Barstow *v.* Gray, 3 Greenl. 409–417; see Morton *v.* Lamb, ch. 118. a. 4. s. 6; Phillips *v.* Fielding, ch. 11. a. 6. s. 3; Stargis *v.* Robbins, ch. 9. a. 20. s. 34; Egerton *v.* Matthews, ch. 11. a. 13. s. 5; Towers *v.* Osborne, ch. 11. a. 4. s. 8; Jones *v.* Barkley, ch. 101. a. 2. s. 18; Allen *v.* Bennett, ch. 11. a. 4. s. 10; Mawman *v.* Gillet, 2 Taunt. 326; Lloyd *v.* Archbowle, 2 Taunt. 324; Rawson *v.* Johnson, ch. 118. a. 3. s. 1, 2; Waterhouse *v.* Skinner, ch. 177. a. 9. s. 32; 5 Johns. 179; 1 Caines, 45.

§ 12. Several partners of a firm may have an action on a guaranty given to one of them, if there be evidence it was given for the benefit of all. 4 Barn. & Cres. 664.

5 Barn. & Cres. 196–206, David *v.* Ellice.

§ 13. *How a partner may be long held.* J. B. Inglis and James Inglis, surviving partners of John Inglis. *Assumpsit* for money lent and usual money counts. Ellice pleaded *non assumpsit*, and Inglis and Inglis their bankruptcy. Verdict for the two bankrupts; but the plt. had a verdict against Ellice for £13,162 5*s.* 8*d.* He moved to set it aside, &c. facts stated. Facts: the plt. was a merchant, residing in Canada: the defts. and John Inglis, deceased, carried on business as merchants in partnership in London, under the firm of Inglis, Ellice, and Co. The plt. had had various dealings with the firm prior to April 30, 1821, then Ellice retired from the firm, and notice of the fact was given to the plt., a creditor of the firm, and the *remaining* partners continued the business, and assumed the funds and charged themselves with the debts of the partnership. The balance due to the plt. was transferred to his credit by the new firm Inglis & Co. and the plt. was informed of this transfer, and assented to it. He afterwards drew on the new firm for part of his balance, and they accepted and paid his bills. The new firm became insolvent. Held, Ellice continued liable for the debt due to the plt. from the old firm. The court observed here no new partner was added; but not so in the three cases cited for Ellice. 4 Esp. 205; 1 East, 195; 5 Taunt. 450–5.

Ballou *v.* Spencer and Spencer, 4 Cowen, 163–168.

§ 14. *Who are not partners.* *Assumpsit* on the following promissory note, 'Lenox, May 1, 1821, for value received, I promise to pay Ichabod S. Spencer, or bearer, one hundred and fifty dollars, with interest in one year from date, witness my hand, William Barrie.'

The declaration contained three counts. The first stated the defts. to be partners in law, and to have endorsed the note

as such partners: 2. Stated them to be bearers and as such to have endorsed it, not saying they were partners: 3. Usual money counts. Defts. admitted the endorsement was in the handwriting of one of them, namely, J. S. Spencer, but denied the other deft., J. A. Spencer, was bound by the endorsement. Plt. offered in evidence a sealed contract in which the defts., with C, for a conveyance from him to them of a farm, and that they will pay a part in good negotiable promissory notes to be endorsed by them. Held, this did not constitute them special partners, so that one could bind both, without the knowledge and assent of the other. The note so endorsed was one of the notes so given for the farm. To prove J. A. Spencer bound, the plt. relied on Ely *v.* Adams, 19 Johns. 313. The note was to J. S. Spencer alone. No evidence J. A. Spencer had any interest in it. Woodworth, J. dissented. He cited 4 John. 251; 1 Esp. R. 30; 3 D. & E. 757, and rested on the ground of a special partnership in this affair.

§ 15. *Partners separated.* *Assumpsit* for goods sold and delivered. On dissolution of partnership, two partners agreed, A and B, that A have the settlement of their affairs, he continuing the business and assuming all debts and accounts outstanding and due, with which the firm had connexion, until they should be settled; that all the monies contributed by B, except what had been drawn out by him, should be paid back by A, within a limited time, creates a separate interest in A; and B's subsequent release of a debt to a creditor having notice of the agreement is void: 2. One partner cannot release a debt due to the firm, even during the partnership, in consideration of a debt due from him *individually:* 3. If such appear to be the fact on the face of the release, it is void. By the above agreement B assigned his interest to A. An assignment need not be in any particular words.

Gram and another *v.* Cadwell, 5 Cowen, 489–494.

§ 16. Distinction between a *dormant* and *known* partner. *Assumpsit.* The plts. sold goods to Hurlburt one of the defts. in May, 1823. Then nothing was said as to his having a partner, and the plts. took Hurlburt's note for the amount, ignorant he had a partner. H. failed. Plts., finding he had a partner, Stewart, sued both for said goods as partners. Held, 1. Stewart was a *dormant* partner: 2. Where the acting partner makes the contract to pay for goods within the scope of their former partnership; this being after actual dissolution, though no public notice be given of the dissolution; and it not appearing the vendors ever dealt with the firm and never having heard of its existence, held, also, that the dormant one is not liable: 3. Where a partnership is

Kelley and Crawford *v.* Hulburt, 5 Cowen, 534–536.

II. Ch. 52. Art. 4.

publicly and notoriously known, all the partners are liable for the contracts of each, within the scope of the partnership, until public notice of the dissolution is given; but it is otherwise of a *dormant* partner. Actual dissolution without notice will protect him. No authorities cited for the plts. For the *dormant* partner cited 4 Esp. R. 89–91; Doug. 371, Evans *v.* Drummond; 2 Johns. 304; 6 id. 144. In Evans *v.* Drummond it was said, the dormant partner is held no longer than he *actually shares in the profits.*

§ 17. Smith and five others, plts. in error, *v.* Lusher & al. defts. 5 Cowen, 688–712. Facts: A, B, C, D, E, and F, six general partners, owe F, one of them, $1000. A makes to him, in the name of the firm, a note for that sum and to his order. F endorses it to G: G sues the six partners and recovers. Two objections: 1. That F was *debtor* and *creditor* in the same note, so it was void, as he could not sue himself as one of the debtors; this the court admitted; but when F had endorsed the note to G the case was altered, for G could sue as plt. F and the other five as defts.: 2. B pleaded the note was given without his knowledge or consent; this the court said was no objection, for it is every day's practice for one partner to give a note, &c. and bind the firm, when, in the nature of their business, another or other partners do not know the fact or consent to it. All the transactions were fair and honest for anything that appeared. See Mainwaring *v.* Newman, ch. 175. a. 5. s. 10; and s. 9, Moffat *v.* Van Millingen; cited Dob *v.* Halsey, 16 John. 38; Foot *v.* Sabin, 19 id. 157, and many other cases, by the counsel: none by the court. Important partnership case, ch. 18. a. 2. s. 16.

§ 18. Murray, surviving partner, *v.* Mumford, administrator of a deceased partner, 6 Cowen, 441, 443. *Detinue* for certain books of account. The plt. and the deceased were partners in trade, and dissolved their partnership, in 1806, by consent. Mumford kept the books to settle partnership affairs. He died possessed of them. Plt. sued as surviving partner. Nonsuited below, on the idea, they, on the dissolution, became tenants in common. New trial granted; and the court above held, 1. The dissolution does not, *ipso facto*, destroy the *joint tenancy* and create a *tenancy in common*. They remain partners for the purpose of settling the partnership concerns. Dissolution is only as to things future: 2. When Mumford died, all the debts and other choses in action, with the books and evidence of debt, as incidents, survived and belonged exclusively to Murray, whose business it was to collect and pay debts, in his own name alone, subject to account for the partnership property to the representative of Mumford: 3. Held,

11 Ves. 5.— 16 id. 57.— 1 Taunt. 104.

the plt. in *detinue* had a right to recover the partnership books from the administrator of Mumford, of course from a stranger. II. Ch. 52. *Art.* 4. *Con.*

§ 19. This was a *habeas corpus* to the sheriff of Suffolk, to bring up John G. Nagro, who had been arrested on a bill in equity between two partners for an account inserted in a writ of attachment. Held, such partner could not be arrested. The bill was founded on the statute 1823, c. 140. Nagro discharged. 5 Pick. 360-370, Commonwealth v. Sumner.

§ 20. The rule, that a promissory note, given in a partnership, shall, in the hand of an innocent holder, be deemed *prima facie* as issued on partnership account, is limited to cases where the signature or other circumstances indicate a partnership concern: 2. If conducted in the nature of an individual, a note in common form signed by him does not *prima facie* bind the partners. The holder must prove it so binds them. The *onus* is on him. 5 Pick. 11.

§ 21. *Assumpsit.* The plt. and others being by deed co-proprietors in a distillery, with a right in each to sell his share, the plt. sold his sixteenth to the defts., they to discharge him of all charges on his share. Plt's. action was for their non-performance. The sale to be by certificate, in writing to be lodged with the clerk, &c. Held, 1. An assignment without such certificate was valid. The plt. declared, that in consideration of his assignment, the defts. promised to pay all arrearages due on his share; proof, a promise to pay them also, what he had paid to the company ($100). Held, 2. The variance was not material, being injurious to the plt alone: 3. After the plt. had so sold his share to two, afterwards, at their joint request, he made a certificate to one of them. Held, the certificate was not the sole, nor the essential evidence of it: 4. Parol evidence was admitted to prove the sale was made to both. The defts. contended there was a material variance, and that there was no sale but by the certificate, and that to Morgan alone, and parol evidence was not admissible to prove Smith was a *joint* assignee, cited 11 Mass. R. 27; 17 id. 303; 3 D. & E. 590. Court held the plt's. interest could be conveyed without deed, it not appearing in the case there was any disposition of real estate, and if a certificate was necessary to a sale, the giving of one to Morgan only, at the request of both, was a virtual compliance with the deed. 5 Pick. 232-236, Alvord v. Smith and Morgan.

§ 24. By art. 42, Commercial Code of France, an abstract of the articles of partnership, whether collective or commandite, must be delivered within fifteen days from their date, to the clerk of the tribunal of commerce of the district, (de Art. 6. *Con.*

II. Ch. 52. Art. 6. Con.

l' arrondissement,) in which the commercial house of the partnership is established, in order to be transcribed on the register and posted up during three months in the hall of the court; and if the partnership have several commercial houses, situated in different districts, the said abstract must be delivered, registered and posted up for three months, at the tribunal of commerce of each district. If these formalities be not observed the partnership contract is void. Art. 43: The abstract contains the names, surnames, qualities, and places of residence of the partners, other than the stockholders of associations or commandatory partners, the commercial firm of the partnership, the designation of those among the partners, authorised to transact, manage, and sign for the partnership, the amount of capital furnished, or to be furnished, by shares, or in commandite partnership, the period when the partnership is to commence and when to end. Art. 55: if one or more of the partners refuse to name arbitrators, &c. they are appointed *ex officio* by the tribunal of commerce. Art. 60: if the arbitrators disagree, they appoint an umpire (un sur-arbitre,) if not previously named by the parties, and if the arbitrators cannot agree in the choice of an umpire, he is appointed by the tribunal of commerce. Art. 61: the award must state the reasons on which it is grounded. It must be filed in the clerk's office of the tribunal of commerce. It has the force of a final judgment, without any modification, and is transcribed on the registers by force of an ordinance of the president of the tribunal, who is required to render it absolute within the space of three days from the time of the delivery into the clerk's office.

§ 25. Art. 210: the owner may dismiss the master. Art. 219: if the master dismissed be part owner of the vessel he may renounce his part and demand a reimbursement of the value of it, and this value is ascertained by appraisers agreed upon or officially appointed. Art. 221: the master, captain, or commander, charged with the management of a ship or other vessel is responsible for faults, even slight ones, in the exercise of his functions. Art. 222: he is answerable for the merchandize whereof he has the charge. He gives a bill of lading for it. Arts. 223, 224, 225, 226, 227, minutely and clearly point out his duties, and arts. 228, 229, provide if he neglect any of them he is made responsible for all accidents which may happen to the prejudice of persons interested in the vessel or cargo and other responsibility. Art. 230: he is exempt from responsibility only on proof of superior force. Art. 231 exempts him and the crew from arrests on board, or going on board, in order to sail, as to all debts but

those contracted for the voyage on which bound, and even these if they give security. Art. 232: the master in the place of residence of the owner, or of their agents, cannot, without their special authority, have the vessel repaired, buy sails, cordage, or other things, for her use, nor take up, for that purpose, money on bottomry, nor let the vessel to freight. II. Ch. 52. *Art.* 6. *Con.*

§ 26. Liability of certain owners, as art. 233 Com. Code. If the vessel be let to freight by consent of the owners and some of them refuse to contribute to the necessary expenses of outfit, the master may summon them, and after the expiration of 24 hours, by the judge's authority, may borrow the amount of their contingent, for their account, on bottomry, on their part of the interest in the vessel; art. 234 impowers him to borrow in the course of the voyage, on bottomry, pledge, &c. for specified purposes, and in a guarded manner. Arts. 235 to 249, point out his other powers and duties, minutely and clearly.

CHAPTER LIII.

THE POOR.

§ 9 *con.* Minor children having their mother's settlement, do not, by the *common law*, gain a new settlement, when she gains one by marriage, though they remove with her to the place of her new settlement. The pauper was born between the years 1701 and 1707, in which time the common law prevailed here, as to settlements. Many cases cited. Art. 1. *Con.* 16 Mass. R. 52–53.

A minor ideot emancipated from his parents may gain a settlement under Maine stat. 1821, ch. 122. So an ideot or a person *non compos*, by any mode in the act not requiring any act of volition of his own. The pauper was an ideot about 7 or 8 years old when his parents died, and the family was broken up and scattered. When about 9 years old he was removed from Eastport, where his parents were settled, to Lubec, where he remained to the commencement of the action, supported at board at his uncle's expense. Held, he lost his *derivative* settlement in Eastport, and gained one in *his own right* in Lubec, under statute of March 21, 1821, ch. 122, s. 2, which enacts that 'any person resident in any town at the date of the passage of this act, who has not, within one year previous to that date, received supplies from some town as a pauper, shall be deemed to have a settlement in the town where he then dwells, and has his home.' See 1 Greenl. 96. Like decision on a clause in Mass. Stat. 1794, Lubec *v.* Eastport; pp. 229–232. By the words '*dwells and has his home*,' in said Maine act, the legislature meant some *permanent* abode, at least, not having any intention of removing. 3 Greenl. 220–222. Turner *v.* Buckfield.

II. Ch. 53. Art. 1. *Con.*

§ 11 *con.* A minor daughter is not *emancipated* while her father has right to reclaim her, though he remove to a distant part of the State and leave her with a friend to be treated as an adopted child till 18 years old. Sumner *v.* Sebec, 3 Greenl. 223–226; Wiscasset *v.* Waldoborough, 3 Greenl. 388–390. A *non compos* of age retains his father's settlement, he residing with him; what are not supplies under Maine stat. 1821, ch. 122. 3 Greenl. 436–437. A *temporary* residence is not within said statute. Such residence is no domicil or *home*. 3 Greenl. 453, notice must be two months before an action can be brought under stat. 1821, ch. 122; see a. 11, s. 17, pages 455–457. An *alien* can acquire a settlement under this statute: nor is a *domicil* of one changed by 5 years absence, he having left home to seek *temporary* employment, and there being no evidence that this purpose had been altered: Knox *v.* Waldoborough: and his wife remained in the town he left, and no evidence he meant to abandon his home.

1 Barn. & Cres. 345.

So where a minor enlisted into the marines, and was discharged and returned to his father's family, while a minor: Held, he was not emancipated.

1 N. H. Rep. 194–198, confirms sect. 3, this article.

§ 5 *con.* Same rule holds if one becomes *non compos* after of age. 3 Pick. R. 173–177, Buckland's case.

§ 20. So in *New Hampshire*. Before Jan. 1. 1796; 2. A bastard child, after 7 years old, can gain a new settlement in his own right, by a year's residence in a different town: 3. A warning out was invalid, unless served and returned to the clerk's office within a year from the commencement of the pauper's residence: 4. The marriage of the parents *after* their child is born does not legitimatize it. And pp. 264—266, a legitimate child before Jan. 1, 1796, more than 7 years old, and whose father was dead, could by a year's residence in a town, acquire a settlement in his own right.

1 N. H. Rep. 260–264, Bow *v.* Nottingham.

Such defect in notice may be waived if not timely objected to. 16 Mass. R. 102—105. Notice sent by the post is not sufficient, 110–112. Notice to a *third* town not answered as to C, does not affect the case between A and B. 17 Mass. R. 432–433; 1 Greenl. 90–142.

§ 21 *con.* The children of slaves in the province, not being slaves, derived no settlement from their parents nor from their parents' master, but were *filii reipublicæ*; 16 Mass. R. 74—79. See s. 23–25 the case of Perkins, treasurer, *v.* Emerson. Was three years after the case of Littleton *v.* Tuttle.

2 N. H. Rep. 242–246, Northwood *v.* Durham.

§ 30. *The pauper's settlement follows the jurisdiction de facto, not de jure. Assumpsit* for the support of John Smith's children. Held, the town of A exercising jurisdiction for 12 years and more over territory found to be a part of the town of B. A is

liable for the support of persons then inhabiting such territory, when they become paupers, for A is estopped to deny the jurisdiction it exercised, and whereof it had the benefits, and so must bear the burdens. II. Ch. 53. Art. 1. *Con.*

§ 31. *Paying taxes.* Settlement is not gained by paying taxes on lands mortgaged, unless the equity of redemption be worth $150. A settlement acquired in New Hampshire is not lost by removing into another State. If a surveyor of highways remove from his town before his year in office is expired, he does not thereby, gain a settlement in it. No recovery for relief furnished more than 90 days before notice. A warrant of removal need not be sealed, and may be signed by the town clerk or selectmen. Notice defective as to one of several persons, all in one list, is defective as to all, because the sums expended for the others do not appear. 2 N. H. Rep. 401, New London *v.* Sutton. p. 131. 296. 470. 406. 530.

§ 32. Overseers of the poor are a *quasi* corporation, and their successors may sue for a debt or duty due to their predecessors in their official's capacity. So as to a debt or duty, their contract. 18 John. 407–418; Pittstown *v.* Plattsburgh; 1 Cowen, 670; 1 Cowen 260, Todd *v.* Birdsall; King *v.* Butler, 15 John. 281; Olney *v.* Wickes, 18 John. 125. 5 Cowen 309–315.

§ 33. Mother's binding out a child, living the father, is valid, if he do not object; and the child serving two years under the indenture, gains a settlement. It seems the father was not a husband. 5 Cowen 527–529.

§ 34. Trespass. Defts. justified as overseers of the poor that they seized the plt's. property, under a warrant of two justices issued on the ground the plt. had left his wife and children a charge to the town. Held, the defts. must state, affirmatively and expressly, the plt. had left his wife and children, a charge to the town as essential to give the justices jurisdiction: not being so stated, judgment for the plt.: 2. One may and must state enough to shew an inferior court has jurisdiction, in order to avail himself of its proceedings; this being done, the party may say *such proceedings were had.* In this case it was admitted on the record the plt. had not so left his wife, &c. Bowman *v.* Russ & Cotton, 6 Cowen, 234—237. Act. 1, R. L. 286.

§ 35. The settlement of the child follows that of the father, if he has one, if not, that of the mother, if she has one, if not, the child's settlement is where born; but it is only so when the settlement of the parents is not ascertained. 6 Cowen 433–435.

§ 15 *con. Domicil.* One may be considered as dwelling, and having his home in a certain town, though he has no particular house there, as the place of his fixed abode. 2 Greenl. 411—415. Art. 2. *Con.*

Children under age, they having the settlement of their mother, acquire the new settlement she gains by another marriage. 1 Pick. R. 199 —200.

H. Ch. 53. Art. 2. *Con.*

§ 21 *con.* 3. Illegitimate children acquire settlement by being born in A where their mother lives at the time of the birth. 1 Pick. R. 144–147.

4. It is sufficient if the freehold of $10 a year be owned by the pauper as *cestui que trust.* 2 Pick. 29–32. But 3 Pick. R. 198—199, Western *v.* Leicester, there must be an actual annual income each of the three years, of the value of of $10. And 1 Pick. 154.

5 Pick. 449. If the estate be dower, the three years commence with the assignment by the commissioners.

1 Pick. R. 129–136. 6. To gain a settlement on the clause, one must dwell in a town the whole year in which he serves as a town officer: 2. Town officers must be inhabitants of the town in which they are chosen, and when they cease to be inhabitants they cease to be officers: 3. The word removal means a removal from the town. Stat. 1785, c. 75.

But a minister ordained over an unincorporated religious Society, composed of members belonging to different towns, is not a *stated Minister of the Gospel* within the meaning of stat. 1786, ch. 3, June 22, 1786, the marriage act. Ligonia *v.* Buxton, 2 Greenl. 102–109. A marriage solemnized by such minister is not legal, and the female does not gain her supposed husband's settlement, and if the marriage be confirmed by a resolve of the legislature, (March 19, 1821,) it only respects her pauper support *after* the confirmation: but does not if the assessors for good reasons do not tax him, though he has taxable property. 2 Pick. R. 535, Reading *v.* Tewkesbury.

2 Greenl. 28–32, Brunswick *v.* Litchfield.

As to citizens of other States, see 2 Pick. 28.

§ 25. Statute 1821, ch. 94, provides that if the deft. town, shall, within thirty days after notice, remove the pauper from the plt. town, it shall be charged only at the rate of one dollar per week. This removal is a condition precedent and must be performed strictly: not enough to prepare to remove, &c. And when this act does not apply, the case is on statute 1793, ch. 59, above.

4 Pick. 45—48, Ware *v.* Wilbraham.

Art. 3. *Con.*

§ 7 *con.* B, a *new* town, is formed partly from the town of C. B by its act of incorporation, is entitled to a proportion of the property, rights, and credits of C. Held, B is not entitled to any part of a fund arising from the sale of land, originally appropriated to the use of the *ministry* in C. It cannot be considered as town's property, but as partaking of the character of the land, from the sale of which it grew. It is a permanent *ministerial* fund.

16 Mass. R. 16—18, Harrison *v.* Bridgeton.

Assumpsit by the town of Norton against the town of Mansfield, for monies expended by the plts., to support one L. Paine. Till April, 1770, Mansfield was the north parish in Norton.

Paine derived his settlement under his great grandfather, which was in Norton. The principle decided was, that an agreement made by the two towns, not included in the act of incorporation of Mansfield, was not binding, as it was not in their power to vote, to charge 'the respective inhabitants, beyond the legislative provision.' Clearly the law only can fix a pauper settlement and not a town vote; 16 Mass. R. 48–52, Norton *v.* Mansfield: another case of a new town, 16 Mass. R. 112–116. It may be observed that the many pauper settlements in the State, growing out of *special* acts of the legislature, erecting new towns out of old ones, depend, invariably, on some special provisions in such acts; hence, they afford no *general* rules or principles in pauper cases, except in a very few cases. Also see 17 Mass. R. 398–400.

II. Ch. 53. *Art.* 3. *Con.*

§ 12 *con.* The overseers, &c., of one town, send a letter to those of another, in a pauper case: this is received and answered; a mistake in it is corrected in a second letter received, but not answered: the second refers to the first letter; but the second alone is defective. Held, both may be taken together, and constitute sufficient notice from the time the second is received. One named *Sally;* notice *Sarah* or *Sally* is sufficient. In the first letter the pauper was named *Mary* Reed, in the second, *Sarah* or *Sally* Reed. The notice may be good though not all at one time. 1 Pick. 470–474, Shelburne *v.* Rochester; and 6 Greenl. 79; case of notice.

Defective notice waived by answers, and no objection to the notice. 2 Greenl. 1, 5. 1 id. 331.

A wife lives separate from her husband, and receives supplies as a pauper, without his knowledge, they are not supplies to him within statute 1821, ch. 122. 3 Greenl. 205–207.

§ 19 *con.* Does an alien, gain a settlement; clearly not, nor can his wife under him, nor can she gain any settlement, but under her husband during her coverture. 1 Greenl. 196–197, Jefferson *v.* Litchfield.

§ 25 *con.* A person residing ten years in a town, and paying highway taxes five years, gains a settlement in it. 16 Mass. R. 236—237.

§ 27 *con.* A person was warned, &c., and then had a child born: this child gained a settlement in the town where born, by a year's residence after of age, and not warned to depart. 16 Mass. R. 454—456.

What is sufficient warning, &c., not a record of the sessions, a mere ministerial act. 2 Pick. R. 436—439.

§ 28 *con.* Nor an alien; 2 Greenl. 194–198; as the wife of an *alien* having a settlement in a town in Maine, she and her children are to be supported in that town. Sandford *v.* Hollis.

§ 35 *con.* A slave of the administrator's intestate escaped from Virginia into this State before the owner died. Held, by United States' laws, 2 Cong. 2 Ses. c. 7, this slave might be taken without a warrant by the administrator's agent though he had taken 2 Pick. 11–20, Commonwealth *v.* Griffith, admr's. agent.

II. Ch. 53. Art. 2. *Con.*

§ 21 *con.* 3. Illegitimate children acquire settlement by being born in A where their mother lives at the time of the birth. 1 Pick. R. 144–147.

4. It is sufficient if the freehold of $10 a year be owned by the pauper as *cestui que trust*. 2 Pick. 29–32. But 3 Pick. R. 198—199, Western *v.* Leicester, there must be an actual annual income each of the three years, of the value of of $10. And 1 Pick. 154.

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Assumpsit by the town of Norton against the town of Mansfield, for monies expended by the plts., to [illegible] L. Paine. Till April, 1770, Mansfield was [illegible]

II. Ch. 53. *Art.* 3. *Con.*

administration only in Virginia, the service belonging to him: that the act of congress, is constitutional; nor was a deed under seal necessary in the appointment of the agent. Was an indictment for assault and battery, &c.; the administrator's authority to seize, was his right to the service, and the Federal Constitution and act of congress.

2 Pick. R. 341 344, New Salem, town of, v. Wendall, town of.

§ 39. *Assumpsit* for monies expended for the support of Hannah Allen, a pauper. She had her settlement in Wendall, and that town made provision for her support. She went into N. Salem, an adjoining town. This town incurred the expenses sued for. It knew of the provision in Wendall, as did the pauper and the person with whom she resided. She was well able to walk to Wendall. Judgment for the defts.

2 Pick. R. 394.

§ 40. Held, if a British soldier deserted from the British army, or was taken prisoner, but not confined in the war of the revolution (1777) and *voluntarily* has lived here since, he is a citizen, and may have a settlement, &c. Both were born in Great Britain. The opinion, in these two cases, seems to be grounded on Massachusett's treason act of 1777, which enacts, 'that all persons abiding within the States, and deriving protection from the laws of the same, owe allegiance to this State, and are members thereof.' The two always paid taxes, and conducted themselves as citizens: were pauper cases, one of them was argued.

N. York, The People v. Supervisors of the county of Cayuga, 2 Cowen, 530—531.

§ 41. An alternative *mandamus* had issued to the defts., commanding them to allow to the overseers of the poor of the town of Aurelius in said county, the expenses of supporting four paupers, claimed to be a county charge, on the ground they had no settlement on the State. In their return they did not deny the expenses had been properly incurred, under the order of magistrate, pursuant to the twentyfifth section of the act for the relief and settlement of the poor; (1 R. L. 287) but stated that the said town had procured an order for their removal to the town of Farmington, &c., as their place of settlement; removed accordingly, &c. Farmington appealed to the sessions, &c.: then Aurelius took back the paupers, and supported them, and neglected to try their appeal; that they rejected the application of Aurelius on the ground, that until the order of removal was reversed, the paupers must be adjudged legally settled in Farmington: 2. Rejection on the above and other grounds. Held, 1. Said order of removal appealed from, and abandoned by the town who removed, who consented to take back the paupers without trying the appeal, was not conclusive as between that town and the county: 2. The county not protected by it, from maintaining the paupers, as one having no residence in the State: 3. Where a magistrate makes an order to maintain a pauper, as a non resident of the State, and unable to be removed, this, it seems, is conclusive upon the board of supervisors. A per-

emptory *mandamus* issued: other pauper cases in New York; 2 Cowen, 537–542; 4 Cowen, 137–141.

§ 42. If the overseers of the poor omit to apply, when requested, to a justice to obtain an order for the relief of a pauper, settled in their town, the proper remedy a *mandamus* to the overseers. If one voluntarily supplies a pauper, it is no ground of action against the overseers. 6 Cowen, 276–281. 11 John. 114; 2 Mass. R. 243.

§ 13. *An alien gains no settlement:* as where a Connecticut man in 1759, removed to Nova Scotia, and took with him B, his minor son. In 1797, he removed from Nova Scotia to Manchester, in Massachusetts, and bought real estate in Manchester, and occupied it above ten years, paying all taxes assessed on it. Held, he was an *alien*, so gained no settlement in Manchester. ART. 4. *Con.* 16 Mass. R. 230–236, Manchester v. Boston. 1 Greenl. 228.

§ 14. An overseer of the poor may, lawfully, endeavour to avoid a charge on his town, by keeping the poor person on his journey, on the direct road on which he is travelling. If the overseer intend to do this, or throw the pauper expense on another town, contrary to statute 1793, ch. 59, s. 15, is a question for the jury; nor is one liable for a deviation from his orders, if his intention be found to be innocent. 'There must be some culpable intention to give such an act the character of crime,' that is, helping a poor wayfaring man on his road. This was an action of debt for a penalty of £20, on said section. 1 Pick. 365–470, Deerfield, inhabitants, v. Delano; and 16 Mass. R. 393–395. The offence punished by the statute of 1793, ch. 59, s. 15, is the bringing a poor person into a town with *intent* to leave him there, a charge on such town. 2 Greenl. 5–8.

§ 15. *Assumpsit* for money laid out and expended by the plts., for the use of the deft., in the support of himself, his wife, and children, for six years, as *paupers;* in fact, this action was grounded on the statute of 1817, ch. 186, s. 5, Feb. 24, 1818. The plts. recovered the sum so paid, after the statute went into operation. It was objected that this act was unconstitutional, as the money was advanced under the injunction of law, in a case of charity, where, at the same time, no debt was created; but the court held it was constitutional, but not retrospective. 16 Mass. R. 215–217.

§ 16. Case in equity, under statute 1817, ch. 87, against Belknap, and other selectmen of Framingham. Property was bequeathed to the town of Framingham: the annual interest thereof, was to be applied, under the direction of the selectmen for the time being, for the support of the testator's children, grandchildren, and great-grandchildren, if any of them should stand in need of support; otherwise, for the support of the poor of the town. A great-grandchild was furnished with support by the town of East Sudbury, where he had his settlement. East Sudbury requested the selectmen of Framingham to reimburse 1 Pick. R. 512–521, inhabitants of East Sudbury v. Belknap & al.

II. Ch. 53. Art. 4. Con.

the expenses, and to provide for the future support of the pauper; and afterwards sued the pauper, and recovered judgment. This remained unsatisfied. Held, East Sudbury was entitled to be reimbursed from the *trust fund*, on a bill in equity: 2. That the town of Framingham, and the selectmen thereof for the time being, should be made parties to the bill: 3. That the pauper need not be made a party: 4. That the court has chancery jurisdiction of the case, by virtue of statute 1817, ch. 87.

1 Pick. R. 105—109.

2 Pick. R. 128 128, Belfast v. Leominster.

§ 17. An action lies against a town after two years, on a verbal express promise of the overseers to pay the expenses: 2. The separation of Maine does not affect the right of a town in Maine; and p. 153.

CHAPTER LIV.

POST OFFICE.

Art. 3. Con.

See ch. 120, a. 5, s. 5.; postmaster-general sued on a bond, &c.

§ 2. He can take a bond and sue in the circuit court, as ch. 187, a. 3, s. 3, Earley's case; though strongly objected to in both respects. The act of congress of March 3, 1815, s. 4, declares, 'that the district court of the United States, shall have cognizance, concurrent with the courts and magistrates of the several States, and the *circuit courts* of the United States, of all suits at common law, where the United States, or any officer thereof, *under the authority of any act of congress*, shall sue, although the debt claimed, or matter in dispute, shall not amount to $100. Earley contended his case was not one arising *under the laws of the United States*,' nor 'a controversy to which the United States are a party;' and that the postmaster general had no power to take the said bond. It was answered, that the authority to sue on such a bond, given in the twentyninth section of the act of 1810, is an implied authority to take it, and a legislative recognition of the notorious preexisting practice of office, confirmed in the fortysecond section, 'saving all suits, and the bonds given by the postmasters;' Dugan & al. *v.* United States, ch. 14, a. 3, s. 9; see act March 2, 1799; and until then no postoffice suits could be brought in the State courts. Hence, of course, they were brought in the federal courts. On the whole it seems to be a clear case.

CHAPTER LV.

USE AND OCCUPATION.

§ 5 *con.* In Maryland, held in the action for use and occupation of a house, the deft. is not estopped to say the plt. had no title to the premises for the time the deft. enjoyed them—was an action against the State. Notice to the Attorney General to appear and defend the State. The house was owned by a third person; plt. urged the State was estopped to deny his title. 3 Har. & M'H. 1—2.

A's land, in B's occupation, is levied on *defectively*, B continues under the creditor's execution and pays him rent; after two years, B purchases the fee of the execution creditor. Another creditor of A, levies on the same land and holds the first creditor out; also B, who claimed under him. A has no action against B for the use, &c. between the two levies; not in *assumpsit*, for want of privity; not in trespass, for by the first levy A was disseised. The action was *assumpsit* for the rents and profits; no implied promise, as B claimed and held against A. 17 Mass. R. 299–302, Allen v. Thayer.

§ 13. *Tenant's acts that prove tenancy. Assumpsit.* A held premises under a lease that expired at midsummer, and he refused to give up the possession at that time, and insisted on notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas. Held, this was conclusive evidence of a tenancy, and that the lessor was entitled to recover a quarter's rent, due at Lady Day. Held, where a tenant occupied under an agreement containing many provisions, and among others, that he should keep the premises in tenantable repair, held, that the landlord might declare generally, 'that the deft. became tenant, and in consideration thereof undertook to repair,' without stating the agreement. 2 Barn. & Cres. 100, Bishop v. Howard. p. 273, Colley v. Streeton.

§ 14. The acceptance of a bond for rent, is no discharge of it; and the landlord who received a sealed note for it, due on a *parol* lease, may have *assumpsit* for use and occupation, on giving up the note, at the trial, to be cancelled. And he may distrain for rent any time before actually paid. In debt for it, tenants in common must join as plts.; but in distress for it, and avowry, they must not join, for this savours of the *realty*. In debt, the release of one, bars all, but not in avowry; holding over is at the same rent, 505. Cornell v. Lamb, 20 Johns. R. 407. 13 Johns. R. 240. 15 do. 479. id.

If A hire the whole house for a year, and lets a part of it to B for the whole year, A's only remedy for B's rent, is by action on the contract. And if a lessor, having no reversion- Prescott v. De Forest, 16 Johns. R. 159

II. Ch. 55. *Art.* 3. *Con.*

ary interest, distrain on his tenant for rent, and sell his goods, the buyer acquires no title to them, and the tenant may have trover for them.

§ 5. So the deft. must not dispute the plt's. title, &c. as where he brought *assumpsit* for use and occupation against a judgment debtor, whose land was set-off to the plt. on execution, and the deft. denied the proceedings were regular, and there was no express promise to pay; and the deft's denying any tenancy, negatived any implied one. Judgment for him, 2 Greenl. Wyman & al. *v.* Hook, p. 337.

§ 7. But *assumpsit* lies not for use and occupation, when the possession is *tortious* either against the wrong doer himself, or his representative; no contract can be implied; for *assumpsit* presupposes a contract, and there can be none where a *trespass* or *tortious* acts, repel one. 2 Nott. & M'Cord, 156, Ryan *v.* Marsh, administrator; 1 D. & E. 378; 6 John. R. 46, &c.

Nor does *assumpsit* lie for the mortgagor against the mortgagee, for the profits he receives of the land between his entry to foreclose and the redemption. The statutes of New Hampshire, as to mortgages, are of February 16, 1791, and January 16, 1795; neither makes any provision in such cases, nor does the common law or equity, in New Hampshire.

1 N. H. Rep. 161—163.

4 Barn. & Cres. 157.

§ 15 *con.* One of five tenants in common, brought covenant on a lease for rent, payable on ——; breach was, that on ——, a large sum of money, to wit, £21,15, one fifth part of the rent for three quarters of a year, of the term then elapsed, became due from the deft. to the plt., and still was in a arrear. Held, good on special demurrer.

Art. 5. *Con.*

1 Cowen, 575.

§ 8 *con.* Held, a tenant *holding over* after a lease is expired, cannot deny his lessor's title, nor enable A to do this by taking a lease from him. The court will not permit him to set up any defence which the tenant could not. A has no right to be considered landlord for the purpose of such defence.

CHAPTER LVI.

WAGERS.

Art. 2. *Con.*

1 Greenl. 84—88, Ulmer & al. *v.* Paine.

§ 6. *Assumpsit* for money had and received against a *stake holder;* prize money was deposited in his hands belonging to several persons, for him to keep till 'legally determined' to which of them it belonged. Held, that no action could lie against him, until the question of property was first settled among them, by a judgment of law. The claimants were bound first to have the question of property settled in the prize court. See Home *v.* Camden, ch. 224, a. 12, s. 13; 5 M.

& S. 122; 12 East. 225; other cases, 11 John. 31, void as to election, one on a life void, 16 East. 156.

§ 5. In the election of a sheriff in Kent county, in Maryland, the plt. and deft. laid a wager of £30, and the plt. won it and sued for it, in the county court, stating the case at large. The plt. waged A would get 600 votes for the office, &c. (see the declaration); plea not guilty; verdict for the plt. £30. Judgment arrested; plt. appealed to the general court; that reversed the judgment, because it 'could not intend the plt. and deft. were residents of Kent county, and voted at the election,' but if such facts were in the record, the general court, said, it would have at once decided the wager was against sound policy, and void. It involved the parties and their friends in such case, in undue influence, and as the general court gave judgment for the plt. for £30 damages on the verdict, and for costs, on the general principle, the court above will give such judgment as the court below ought to have given. 4 Har. & M'H. 284--287, Wroth *v.* Johnson, cited 2 Bac. Abr. 230; feigned issue, 2 Cowen, 465; form of it.

§ 6. Wagers are only illegal when forbidden by some statute, &c. where calculated to injure third persons and thereby disturb the peace and comfort of society; or when against morality, or the sound policy of the State. The act of December 19, 1816, does not include horse racing; but such wager is illegal by 9th of Ann, ch. 14. 1 Nott & Mc Cord, 180–182.

§ 7. Money deposited on an illegal wager, may be recovered from the stake holder, who has paid it over *after* notice not to do it, but otherwise, if fairly paid over. 1 Nott & Mc Cord, 178–179.

§ 8. May 14, 1821. 'This day, S. Ives bet $100 with J. Phillips, that Napoleon Bonaparte will, at or before two years from the above date, be removed or escape from the island of St Helena. It is understood between the parties that if Bonaparte should die within the above period of two years, and on the island of St Helena, that Ives loses the bet.' The wager was adjudged void, three judges to two; Supreme Court of Pennsylvania. Bonaparte did die on the island, within the two years, or was dead May 14, 1821. The decision was on the ground the inquiry might be injurious to his feelings, and that other men had no right to affect them, to answer their purposes of caprice, malice, curiosity, or their other purposes.

II. Ch. 57.
Art. 1.
Con.

CHAPTER LVII.

WAGES OF SEAMEN.

§ 2 *con. Wages payable where freight is not;* as where a vessel was chartered 'for a voyage to be made from Portland to sea, and take a cargo from on board the British brig *Fountain*, and proceed with the same to one or more ports in the *West Indies*, and from thence to Portland.' Holden to be one entire voyage; yet in such case, seamen's wages are due at the port of destination in the *West Indies*, though the payment of the charter was made expressly to depend on the completion of the voyage at Portland, where the vessel never arrived, being lost, while lying at her outward port, that is, at St Bartholomew's, in the West Indies. The court observed the owners' right to freight, depended on the charterparty. 'But the right of seamen to their wages, is not affected by that condition, unless they have assented to it by express stipulation.'

French Com. Code, art. 259.

§ 3 *con.* Same principle. If some part of the vessel be saved, the seamen engaged for the voyage, or by the month, are to be paid their wages, already due, out of the wreck thus saved; a. 261. In whatever manner the seamen may be hired, they are to be paid their day's work while employed in saving the wreck and the effects on board; a. 262. Seamen are to be paid their wages and receive medical treatment at the expense of the ship, if they become sick during the voyage, or be wounded in the service of the ship; a. 263. The seaman receives medical treatment at the expense of the ship and cargo, if he be wounded in fighting against enemies or pirates; a. 264. If a seaman leave the ship without leave, and is wounded on land, the expenses of his medical treatment are at his charge, and the captain may discharge him. His wages, in this case, are paid, but in proportion to the time he serves; a. 265. If a seaman die in the voyage, and is engaged by the month, his wages are paid to his heirs or assignees up to the day of his death; and if engaged for the voyage, one half of his wages is due, if he die on the voyage out or at the port of destination; the whole, if he die in returning. If engaged on the profit or freight of the vessel, his whole share is due, if he die after the commencement of the voyage; and if killed in defending the ship, all his wages are due for the whole voyage, if she arrive safe. Arts. 266—272, his other rights, liens, and duties, in cases of capture, ransom, &c.

§ 19. Pothier on Maritime Contracts, edition 1821, Part 3. In this valuable little work we find some rules and doctrines founded in sound reason.

1. If a sailor engage for a voyage described in the ship Julia, A B, master, and during the voyage another ship is substituted, or another master takes the place of A B, the sailor is held to continue the voyage. This commercial policy requires, and his contract is, in substance, with the owner, whose agent the master is.

2. But if a longer voyage be substituted, the seaman is not bound to serve in it: his contract is not for this.

3. If the sailor, by his own fault, fail to fulfil his contract, he is not entitled to any wages.

4. Generally, if he fail so to fulfil by reason of some accident *of superior force*, he is entitled to wages only for the time he has served. Superior force is the act of God and of sovereign power; as laws of non-intercourse enacted, defeating the voyage, arrest of princes, storms, shipwreck, stranding or capture of the ship, sickness or death of the mariner.

5. Sailors employed in saving the property in danger have a lien on the property saved in preference to all others. See sect. 3, Frothingham *v.* Prince. But when nothing is saved freight and wages are all lost.

6. The sickness or death of a sailor, (being accidents of superior force) which prevents his affording the assistance to the master stipulated, does not deprive him of all his wages. Hence if either prevent his sailing in the ship, his wages never commence, if he has laboured in preparing for the voyage he or his executor is paid for that.

7. But if the sailor be sick, or dies, or is wounded in defence of the ship in the course of the voyage, if he lives he has his wages, if he dies his executor or administrator has them, and if there be a loss and some property saved, he or his representative, as the case may be, may be paid out of the goods saved as well as the wreck of the ship. The indemnity due in the case being common average, to which the goods ought to contribute; but the fighting, in case of the wound of the sailor, or his being killed, must prevent the capture, for if that be made there is no contribution.

8. If a seaman be discharged for his own fault, as intemperance, or incapacity, theft, being refractory, or quarrelsome, &c. so as to produce disorder in the ship, he has wages only to the time of his discharge. Mar. Ord. 1681.

9. If the discharge be by the master's fault and unreasonable the seaman has his wages.

§ 5 *con.* On a libel for seaman's wages the court will enforce the payment of the three months, required by the act of Congress of February 28, 1803, ch. 62, where seamen are

II. Ch. 57. *Art. 2. Con.*

discharged abroad without the payment of them. As to master's wages, 2 Mason, 91 and 96, Willard *v.* Dorr. 1 Mason, 45, Emerson *v.* Howland.

2 Mason's R. 545-563, Harden *v.* Gordon & al. master and owner of the brig Enterprize.

§ 7. *Cases of sickness.* Suit for subtraction of wages earned by the plt., as mate, on a voyage, from Portland to Guadaloupe and a market, and back to Portland. The libel, also included a claim for the expenses occasioned by the plt's. sickness in a foreign port in the course of the voyage. Held, 1. These expenses were a charge on the ship, by the maritime law; and in this charge are included not only medicines and medical advice, but nursing, diet, and lodging, if the seaman be carried ashore: 2. The act of Congress, as to seamen, &c. has not changed the maritime law, except as to medicine and medical advice, when there is a proper medicine chest and medical directions on board the vessel. The charges of nursing and lodging are not affected by the act: 3. The court of admiralty has jurisdiction to enforce the payment of these expenses by a libel, for they are in the nature of additional wages, during sickness: 4. A stipulation, the seaman shall pay for medical advice, &c. is void, as contrary to the policy of the act of Congress: 5. As to a receipt in full of all demands, it is *prima facie* evidence, but may be explained. 'A sick seaman, while on board, is entitled to receive suitable sustenance, and attendance from the ship and crew, during his illness;' and the marine ordinances, 'evidence of the general marine law, authorize a similar allowance, when he is put ashore.' The seventh article of the laws of Oleron is thus, 'If it happen, that sickness seizes on any one of the seamen, while in the ship's service, the master ought to set him ashore,' 'also to spare him one of the ship's boys, or hire a woman to attend him, and to afford him such diet as is usual in the ship.' The nineteenth article of the laws of Wisbuy is thus, 'If as eaman fall ill of any disease, and it is convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him.' The fortyfifth article of the Hanseatic ordinance is thus, 'If any mariner fall sick of any disease he shall be put ashore and maintained in like manner as if he were on ship board, and be attended by another mariner.' The French ordinance provides he be cured at the expense of the ship. See art. 5. s. 12; see 3 Mason, 160, 174.

12 Serg. & R. 266, Buck *v.* Lane: if a seaman embezzle, &c. he clearly forfeits his wages. Other cases, 2 Mason's R. 319; 3 Mason's R. 161.

Art. 5. *Con.*

§ 18. *Passengers in ships and vessels.* Act of Congress, March 2, 1819, directs, that not more than two passengers be

taken in to five tons of shipping, in vessels coming to or going from the United States, custom-house measure, exclusive of the usual number of seamen to navigate the ship or vessel. Penalty on the person who takes in and on the owner, severally $150 for each passenger beyond such proportion; and if the extra number be twenty or more passengers in the whole, then the ship is forfeited to the United States, as is also said penalty.

II. Ch. 57. *Art.* 5. *Con.*

§ 19. *Master, how liable for goods sent by a freighter or not.* *Assumpsit* against the deft. on his undertaking to carry to Virginia and a market, boxes of marble, with orders to dispose of them for the most he could obtain. He could not find a purchaser, and left them in the hands of a merchant, in good credit, to be sold for the owner. Plt. contended the deft. was bound to sell at any rate, or if he could not sell he was bound to bring the articles back to Salem. The court held there was no order to bring back the articles, and added, 'it is well known law, that if a consignee cannot sell without a great sacrifice of the property, he is not obliged to sell; such a circumstance being considered as an unexpected contingency.' See ch. 30. a. 11. s. 9; 1 Pick. R. 343.

2 Pick R. 615 Day v. Noble

CHAPTER LVIII.

CASE ON TORTS.

§ 11. *Case for not authorizing the discharge of a debtor,* &c. Held, a creditor is bound to accept from the debtor in custody on a *ca. sa.* the debt and costs when tendered, and to sign an authority to the sheriff to discharge; and if the creditor refuse to do this, case lies against him, and such refusal is evidence *prima facie* of malice, in the absence of circumstances to rebut the presumption.

Art. 1. *Con.*

4 Barn. & Cres. 26, Crogin v. Pilling.

§ 12. *Case against assignee in tort.* The plts., lessees of a term by *deed poll* assigned to the deft. he to pay rent and perform covenants in the original lease. Deft. occupied and before the term expired assigned to C. The lessor sued the now plts. for breaches of covenants while the defts. occupied and recovered damages against them. Held, the present plts. might have case *in tort* against Lynch, assignee, for neglecting to perform the covenants while assignee, whereby the plts. sustained damages.

5 Barn. & Cres. 589-611, Burnett & al. exrs. of Burnett v. Lynch.

§ 17 *con.* This maxim, *sic utere,* &c. was applied in the following case, and numerous authorities cited. There was a milldam across Turkey river in Concord, and mills at the north and south end of the dam. A, owning the dam, &c.

Art. 2. *Con.*

2 N. H. Rep. 532-539, Runnels v. Bullen.

[. Ch. 58. *Art. 2. Con.* granted to B, by deed, *one half of it*, with the privilege of taking the water from any part of the half granted. Held, the deed passed the right to the use of *one half of the water only*, and that case might be maintained by A against B for taking more than half of the water to the injury of A. The action was for opening sluiceways in the dam, and diverting water from the plt's. mills. The deft., under B, contended he had a right totally to destroy the north half of the milldam, or to draw water from it as he pleased. The plt. claimed as the court at last decided, for on examination it changed its opinion in some respects.

CHAPTER LIX.

AGENT AND PRINCIPAL, &c. AS TO TORTS.

ART. 1. *Con.* § 4. But generally the employer or master is not responsible for the *wilful* and unauthorized trespass committed by his agent, overseer, or servant. Harris *v.* Nicholas, 5 Munf. 483.

ART. 5. *Con.* 'halhimer v. Brinckerhoff, Cowen, 90–08. § 11. *Assumpsit* by the principal against his attorney for moneys had and received by him for lands sold, and held, the action lay if the deft. retained the money: 2. The deeds executed by the attorney expressed the consideration received. Held, *prima facie* evidence of the receipt of the money: 3. When an agent is authorized to receive money for his principal, or do any other thing, his drafts, receipts, accounts stated, or admissions relative to the subject, or his agency, and especially when all these are offered in connexion, constitute a part of the *res gesta*, and are competent though not conclusive evidence against the principal. Thalhimer *v.* Brinckerhoff, ch. 202. a. 9, Champerty, s. 2. The deft. was the attorney of Teller, who claimed the land and agreed to allow the plt. one fourth of what he should recover, he to pay half of the costs, &c. Plt. sued for his fourth part of the money deft. received for the land, by compromise, $75,000. The deft. set up, in his defence, that he did not know the plt., or of his agreement with Teller, till after he had paid to Teller, and he had discharged the deft. of all the moneys he had received, and that Teller was in fact the plt's. agent to receive the money, or otherwise to discharge the claim for it. But the court thought the evidence proved that the deft. early knew of the agreement between Teller and the plt. Deft. had his power of attorney from Teller, under which he commenced the action. The court thought the plt. must have known the progress of the business and impliedly assented that Teller should settle the whole affair with the deft. and

viewed Teller as his, the plt's. agent, and looked to him for the plt's. part of the money. The plt. did permit Teller to act as his agent. New trial granted, there being a verdict below for the plt. for $13,500; but whether the evidence proved the deft. had fully settled with Teller or not, was left to a new trial. Not necessary to call Teller as a witness to prove such settlements, as his receipts, admissions, &c. were evidence as part of the *res gesta*. 3 D. & E. 454; 7 id. 665; 4 Taunt. 511, 563, 663; 10 Johns. 44; 2 Campb. R. 555; 2 Wheat. 380.

Another case of an attorney's or agent's power, how construed. 6 Cowen, 354–359.

§ 10 *con.* Case for seducing and debauching Jane Moran, the daughter and servant of the plt. *per quod servitium amisit*. The action was brought by the *mother*, the head of the family, and objection, the action should have been *trespass*. Held, in general, the plt. has his election to bring case or trespass for this injury: 2. To establish the relation of master and servant, in this case, the slightest acts of service are sufficient. See art. 7, s. 4; 12 East 409; 3 Burr. 1878; 2 D. & E. 166, for trespass, for case, 2 Chit. Pl. 266—268, 1 Chit. Pl. 137; 2 Bl. Com. 459, and Martin *v.* Paine, 9 Johns. R. 387; to prove the relation of mistress and servant was established, were cited. 3 Bl. Com. 142, note by Christian; Selw. N. P. 967; 2 Phil. Evid. 156 s. 7: court cited in support of case Reeves' Dom. R. 293; 3 Serg. & R. 315; Selw. N. P. 1083; Ld. Raym. 1032. Moran v. Dawes.

§ 11. Like action brought by the mother, a widow, for the seduction of her daughter, who at the time her child was begotten, was an indented apprentice, but before the child was born the indentures were vacated, and the daughter returned to her mother's, and there the child was born; the daughter was the principal witness: Held, 1. The action lay: 2. The jury are judges of the weight of evidence: 3. They could not, by law, give damages for bringing up the child: 4. In such case the court will not grant a new trial for excessive damages, unless they be such as to show partiality, passion, or corruption in the jury. Plt's. counsel did not contend there was any seduction, but only that the deft. was the father of the child. Verdict for the plt. $920. Some of the jury swore they allowed $900 for bringing up the child, and only $20 for the expenses and loss of service, and nothing for violating the daughter's chastity, or corrupting her morals. On the first point the court cited Martin *v.* Payne, 9 John. 38, [admitted if the indentures had continued, the mother's action had failed.] Bennet *v.* Allcott, 3 D. & E. 168; 1 Salk. 206;—2 point, 3 John. 182–262–270; 15 id. 496;—3 point, 9 John. 51; 12 id. 235; 10 id. 446; 4 D. & E. 461; 5 Taunt. 277; 11 East 22. New trial granted be- Sargent *v.* ——, 5 Cowen 106–125.

II. Ch. 59. *Art.* 9. *Con.*

cause the jury mistook the law in allowing damages for bringing up the child: also some new evidence.

§ 2 *con.* Trespass against assessors. If they show by the records they were duly chosen at a town meeting, legally warned, they are not bound to go beyond the records; and to show the warning officer proceeded regularly; and by statute 1785, ch. 5, the State, county, and town taxes, are required to be separately assessed and put into separate lists; but the stat. 1823, ch. 138, passed since this decision was made.

1 Pick. R. 109–113. pp. 482—484.

2 Pick. R. 392. It is illegal for the assessors of a parish, to make an assessment on a valuation made by the assessors of the town, 'a usage adverse to law cannot repeal it.'

§ 9 *con.* A town has no power to assess the inhabitants to raise money to buy an exemption from toll for them at a toll bridge. Necessary charges mean only charges relating to corporate duties.

2 Greenl. 191–197, Bussey v. Gilmore.

Art. 10. *Con.*

§ 2 *con.* Was case for rashly setting a fire on land of the deft., which fire was so negligently guarded, that it spread to land of the plt., and there caused much damage. Plea general issue, point decided; when a servant acts under the special orders of his master, the master is not liable for his negligence in doing business not ordered. In this case, the master directed his hired labourer to set fire in one place, this he did; and of his own accord, causes fire to be made in *another* place, and it was this second fire that spread and injured the plt.; master not liable: cited 6 D. & E., 125–411, and some others of the numerous cases in this chapter, relating to masters and servants, principals and agents, &c.

2 N. H. Rep. 548–550, Wilson v. Peverly.

§ 4. *Agent selling lands.* An agent is empowered to sell lands; B buys of him, he cannot insist on a valid sale, if he know of any fraud or breach of trust in the agent; 2. If B fails to inspect the agent's written power to sell real property, this affects B with notice of any defects or qualifications in the writing.

2 Rand. 6–20, Morris & al. Terrell.

§ 5. A, owing the plts. they agreed he should sell on credit, and take bonds payable to them, to take such in payment as they approved. A sold, and gave them notice of the kind of bonds, and took from the deft. for his purchase, a bond payable to the plts. This being offered to them, they refused it, and it was returned to A, to use as he saw fit. Held, A became *the agent* of the bank to take and receive the delivery of the bond from the deft., and that the bond, by the delivery to A, was complete.

Bank of Newbern v. Pugh, 1 Hawks. 198.

§ 6. An agent who receives money due to his principal, on bond or judgment, is liable, merely as a simple contract debtor. How an agent entrusted to sell his principal's property and buys it, ought to prove clearly fairness in all respects whatever: Butler *v.* Haskell.

3 Desauss. 116. 4 do. 705.

CHAPTER LX.

BASTARD CHILDREN.

§ 2 *con.* As to the mother's want of chastity, &c. see ch. 84, a. 2, s. 8.

When the mother of such child makes her charge before a magistrate, the charge must be taken down in writing under the statute: 2. On an appeal from an order of a county court providing for the support of the child, it is error for the appellate court to receive new evidence of the facts, not before the county court: 3. The right to appeal from *facts* is confined to cases of mills, roads, the probate of wills, and certificates for obtaining administration. In Virginia, the *county* is chargeable in such case; farther, ordered to pay $30 a year for ten years; about 58 cents a week. 1 Rand. 464—465.

Provision for the mother of a bastard and her infant, is a sufficient consideration to support a bond made by the father of the child for that purpose. 1 John. Ch. R. 329, Bunn *v.* Winthrop.

§ 6 *con.* To make the mother a competent witness, she must be examined in the time of her travail, and accuse the deft. of being the father, and before the child is born. 5 Pick. 63—64, Bacon *v.* Harrington. Art. 3. *Con.*

§ 7 *con.* Under Massachusetts Statute 1785, ch. 66, Maine Statute, 1821, ch. 72, a bond is not necessary to give the Common Pleas jurisdiction, if the deft. appear in person or by attorney: 2. The court may render judgment of *filiation* on default: 3. Deft. may waive a jury trial, as it is for his benefit: 4. The statute authorizes an order the putative father pay a weekly sum *till the further order of the court:* 5. So judgment for costs: 6. The right to issue *a capias* is incident to the jurisdiction of the Common Pleas, in all cases of contempt. See ch. 150, a. 8, s. 14. Art. 4. *Con.* 2 Greenl. 165-173, Mariner *v.* Dyer, in *certiorari.*

A bond to prosecute, given under said acts, conditioned the deft. appear *and abide the order of the court*, holds him to pay such money as the court orders for the maintenance of the child, as well as to give a new bond to perform such order. The new bond the court may require, as only one superadded; and this the accused may avoid giving. See Merrill *v.* Prince, ch. 150, a. 8, s. 14. 3 Greenl. 433-435.

§ 2 *con.* 4 Pick. 93--96. The mother of a bastard child cannot inherit his estate; otherwise by Mass. act, March 3, 1829, see ch. 126, a. 1, s. 2. Art. 5. *Con.*

§ 13. Debt on a penal bond given to R. and F. as overseers of the poor of the town of Clermont, conditioned to in-

II. Ch. 60. Art. 5. Con.

demnify as well such overseers as all and every other inhabitant, &c., against all costs, charges, rates, assessments, damages, expenses whatever, for or by reason of the birth, education, and maintenance, of a bastard child, begotten by said Donely, &c. describing the mother, &c. Held, 1. The action did not lie, unless the overseers proved they had been damnified by actual payment or other disbursements in support of the child; that a mere liability to maintain it, was not sufficient: 2. An order of filiation against the putative father, charging him with a weekly payment of money for past expenses, &c. is not admissible in evidence in such an action. The order was made by two Justices, charging Donely with the payment of $16, lying in, and other past expenses, and 50 cents weekly thereafter. No disbursements by the overseers proved, &c. but about $50 were due on the order, at the time of the trial. Woodworth, J. dissented; cited for Donely, Chilton *v.* Whiffin, 3 Wils. 13; Griffith *v.* Garrison, 1 Salk. 196; 1 Johns. R. 486; 12 id. 195; 13 id. 380; 18 id. 122; 407, &c.; against Donely, 1 Johns. R. 491; 1 H. Bl. 253, Hays *v.* Bryant; 3 Johns. R. 26; 9 id. 367; 16 id. 155; 18 id. 352, &c.

Donely *v.* Rockfeller & Feller, 4 Cowen, 252-260. Error from the Common Pleas of ——

§ 14. *Assumpsit* for meat, drink, &c. provided, and work and labor in and about nursing, &c. Catharine Trovinger, the plt's. daughter and her two infant children, at the deft's. request, and on his promise to pay, &c.; he was the *putative* father. Held, a promise to pay for the board of a woman and her bastard child by him, the purpose of both parties express or tacit, being to facilitate a continued state of cohabitation, between the promisor and the woman is void: but 2, the purpose must be clearly proved; and is not to be inferred from a previous cohabitation between them, with the knowledge of the promisee: 3. The fact is not a sufficient ground for the jury to infer consent to a subsequent cohabitation in a case where the woman is the daughter of the promisee: 4. It makes nothing toward such an inference, and should not be submitted to the jury. See Decker *v.* Livingston, 15 John. 479; Lloyd *v.* Jonnson, 1 Bos. and P. 340, and cases cited.

Eve Trovinger *v.* M'Burney, 5 Cowen 253-257.

CHAPTER LXI.

COPY RIGHTS, &c.

Art. 1. Con.

§ 4. *How printers may be restrained at common law.* As where a bookseller employs a printer to print so many copies of a work for the bookseller and no more, and with the types set up, the printer prints an extra number for his own use and sale, he is liable to pay damages to the bookseller, though he

prove no special damages. Contract one thousand copies: printers printed fifteen hundred, and sold two hundred and fifty, &c. for their own use. The plts. relied on usage among printers and booksellers. The copy right was not secured. II. Ch. 61. *Art.* 1. *Con.*

§ 5. Action for infringing the machine in the case of Evans *v.* Eaton, art. 3. s. 1. Held, the sixth section of the patent act of 1793, ch. 156, which requires a notice of the special matter to be given in evidence by the deft. under the general issue, does not include all the matters of defence which the deft. may be legally entitled to make; and where a witness was asked, whether the machine used by the deft. was like the model exhibited in court of the plt's. patented machine, held, that no notice was necessary to authorize the inquiry. 7 Wheat. 458-470, Evans *v.* Hettich.

§ 6. The first publisher of a libellous or immoral book cannot maintain an action against any person for publishing a pirated edition. 5 Barn. & Cres. 173.

Supreme court of the United States, January term, 1829, decided that an inventor, who, *before* he applies for his patent, suffers his invention to be publicly used, cannot afterwards have a patent. His so doing is an abandonment of his right.

§ 11 *con.* Action of covenant broken. The declaration stated that the plt. and deft. were the joint inventors of two machines for dying and drying silks. The one called the reel, and the other the lap-frame; that they mutually covenanted so to cooperate as to secure to themselves the benefits of the same, and that for this purpose they covenanted that the deft. should have secured to him the exclusive use and sale of the machines in Massachusetts and Rhode Island, and the plt. in the rest of the United States; that neither should use or sell the machines within the district of the other, under the forfeiture of $1000 for each machine so used or sold. Yet the deft. made fifteen machines to be used in Staten Island in the State of New York, and employed the same in that place, by which he forfeited and covenantad to pay $15,000. The deft. pleaded six several pleas, &c. Points decided: 1. It was ill to plead neither party was the inventor, or separate patents to them before agreement, or a subsequent joint patent, was void: 2. To a plea, that each, supposing himself the inventor, procured a patent and entered into the agreement, expecting, by his patent, to enjoy the exclusive right within his district, and that the patents were void, a replication traversing that they entered into the agreement under that supposition and expectation, was held sufficient: 3. The agreement was not void as being in restraint of trade, there being a reasonable consideration: 4. After obtaining the Art. 2. *Con.* 1 Pick. R. 445 452, Stearns *v.* Barrett.

II. Ch 61. Art. 2. Con.

joint patent neither party could set up the prior separate patents, and that neither was estopped by them from alleging the invention was joint: 5. If the joint patent was void, still the agreement was valid, the patent forming no part of the consideration: 6. Covenant was the proper action in the case: 7. Said forfeiture was a penalty, and not liquidated damages.

Art. 3. Con.

§ 1. It is no objection to a witness's competency, in a patent cause, that he is sued in another action for an infringement of the same patent: 2. It is no objection to a witness that he is subject to fits of derangement, if sane at the time of giving testimony. 7 Wheat. 356 to 652; and see Evans *v.* Hettich, 7 Wheat. 453–470.

§ 7. An edition of the laws of a State, revised and collected by A, under a resolve of its legislature, is not such a work as entitles A to secure the exclusive copy right. 4 Har. & Mc H. 345, 346, Kelley *v.* Green.

1 Pick. R. 162, 163.

§ 8. *Assumpsit* to recover damages for the breach of a warranty made on the sale of certain machine cards. The declaration alleged the defts. warranted them *to be good and merchantable.* Held, proof of a warranty they were *equal to any in America,* does not support the declaration.

9 Wheat. 603–615, Ex parte Wood.

§ 9. *Proceedings to repeal a patent.* Process was the act of Congress of February 21, 1793, c. 11, and the judge of the district court of the southern district of New York granted a rule on Ch. Wood and Gilbert Brundage, on the complaint of Jethro Wood, to show cause why process should not issue against them, to repeal a patent granted to them for a certain invention. July, 1823, rule made absolute, and that said patent be repealed; that process issue to repeal the said patent, &c. The patentee moved the court to direct a record to be made of the whole proceedings, and that process in the nature of a *scire facias* issue to try the validity of the patent. The court denied the motion on the ground that these were summary proceedings; and that the patent was repealed *de facto* by making the rule absolute, and that the process to be issued was merely to repeal the patent. In the supreme court of the United States, held, 1. The patent was not so repealed *de facto:* 2. The proper process is in the nature of a *scire facias* at common law, to the patentee to show cause why the patent should not be repealed with costs of suit: 3. On the return of such process duly served, the judge is to proceed to stay the cause on the pleadings filed by the parties and the issue joined thereon, to the jury, or the court, as the issue may be. Record to be made, &c. as requested by the patentees as above. A *mandamus* issued to the district court

to make such a record and to issue such process in the nature of *a scire facias*, &c. as the patentees asked for; this was the true course in order to try the cause on such a proper issue in law or fact, as the parties, in their pleadings, might form. II. Ch. 61. *Art.* 3. *Con.*

How far B's contract with C, for the use of A's machine, invades, or not, his patent-right, &c. Deft. pleaded the general issue, and gave notice of what he meant to prove. 1 N. H. Rep. 347–350, a patent case. 10 Wheat. 358–367.

CHAPTER LXII.

DECEIT.

§ 1 *con.* The ground of this action is fraud, and it lies against an infant on a warranty, for the sale of a horse, even when the form of the action is *ex contractu*, and the substance *ex delicto*. 1 Nott & Mc Cord, 197–200. Art. 1. *Con.*

1 Greenl. 376–394, Cross & al. *v.* Peters, held, 1. To enable the vendor to rescind a contract for the sale of goods, and reclaim them on account of the vendee's fraud, it must appear that deceptive *assertions* and false *representations* were fraudulently made to induce the vendor to part with the goods: 2. The mere insolvency of the vendee and the liability of the goods to immediate attachment by his creditors, though well known to himself and not revealed to the vendor, will not avoid the sale. The vendor brought replevin against a deputy sheriff, who had attached them as the property of the vendee. Plea, property in him and not in the plt. and issue. The vendee was admitted as a witness not having paid for the goods. This case is largely considered and numerous cases cited. Bean *v.* Bean, ch. 90. a. 11. s. 35.

§ 13 *con.* The principle a *sound* price implies warranty of a *sound* article sold, is a principle of the *civil*, not of the *common* law. In South Carolina, that of the *civil* law seems long to have been adopted. See 1 Bay. 66, 324; 2 Bay. 19, 380, 324; 1 Constitutional Reports, (are of a court of appeals only,) 182–360; 2 do. 143; 1 Nott & Mc Cord, 142, 194; 2 Nott & Mc Cord, 60, 76, 153, 156, 265; 1 Mc Cord, 100–537. But in South Carolina this implied warranty, resting on a *sound* price, is not extended to *sheriff's* sales, for in them there are no implied warranties; but is to the sales of executors and administrators, and the tender of the property, found to be defective, must be unconditional, definite, and certain. 1 Nott & Mc Cord, 194, 197, Nor does an implied warranty extend to the *moral* qualities of a *slave*. 1 Mc Cord, 220. But it extends to *auction* sales; sales even by executors and administrators. 2 Nott & M'Cord, 153–156. 2 Const. R. 148.

II. Ch. 62. *Art.* 1. *Con.*

4 Rand. 5, 8, said, so is the civil law rule adopted in North Carolina, but the common law rule is adopted in Virginia. Pages 8 to 18: there is no implied warranty in sheriff's sales; the rule *caveat emptor* applies to such a case. 4 Barn. & Cres. 108, is the principle of the common law. See ch. 115. a. 2. s. 8. Vol. 4.

2 Litt. 227.

If the purchaser cannot see the property when purchased, and the vendor must understand the purchaser relies wholly on his representation, the rule the buyer is bound to notice palpable defects does not apply.

§ 16 *con.* But if the vendor or lessor falsely affirms a fact in his own knowledge alone, to the injury of the vendee or lessee, &c. an action lies; as where the vendor of a public house, pending a treaty for selling it, made certain deceitful representations as to the amount of business done in it and the rents received for parts of the premises, whereby the plt. was induced to give a large sum for them. In an action on the case the plt. recovered.

3 Barn. & Cres. 623–626. —See art. 3. 7. —2 B. & C. 627.—12 East, 6.

Art. 2. *Con.*

§ 17 *con.* A purchaser of a parcel of wheat, by sample, has a right to inspect the whole in bulk, at any proper and convenient time; and if the seller refuse to show it, the buyer may rescind the contract.

1 Barn. & Cres. 1–3.

6 Cowen, 354–359, Andrews v. Kneeland.

On a sale by *sample* the vendor is responsible that the bulk of the commodity shall be equal in quality to the *sample*; and an agent or broker, not restricted expressly in his power, may sell by *sample*, or with *warranty*. His power, in some cases, grows out of the nature of his business.

3 Mason, 101.

§ 19 *con.* But this action cannot be supported, if the representation be in substance true according to the party's knowledge and belief; the gist of this action is fraud. 6 Cowen, 346–354.

The person who recommends another *must know him not trustworthy of the credit proposed* to make him liable. 3 Rand. 410–434, Lang *v.* Lee & al.

2 Pick. R. 214–223, Hastings v. Lovering, Jr.

§ 21. *Warranty, what—agent personally liable on it. Assumpsit.* Whereas, in consideration the plt. would buy of the deft. two thousand gallons of winter oil, of prime quality, the deft. promised the plt. that the said oil was of a good and superior quality, to wit, prime quality winter oil. He the plt. did buy the two thousand gallons, yet the oil was not prime quality winter oil. The warranty was proved thus, 'Boston, April 11th, 1822, sold Mr E. T. Hastings two thousand gallons prime quality winter oil, half in tierces, half in hogsheads, at eighty cents per gallon; six months' credit, deliverable within ten days, credit to commence on delivery. William Lovering, Jr.' Was delivered.

2. It is not a material variance to declare on such a contract as an undertaking that 'the oil was of a good and superior quality, to wit, prime quality winter oil.' II. Ch. 62. *Art.* 2. *Con.*

3. As the factor gave the bill to the plt. without designating that he, the factor, acted as an agent, was held personally liable, though he had settled with his principal before notice of the breach of warranty; and though before the oil was delivered, and the bill of parcels made out, the owner of the oil had informed the vendee that it was sold on his account, and before the action was brought the agent also informed him of the same fact. The deft. denied there was any warranty in the bill of sale. Above fifty authorities were cited in this case by the counsel.

§ 22. 3 Bulst. 95, per Croke, J. 'fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth.' See Haycraft *v.* Creasy, 2 East, 92–109; art. 2. s. 19; Clifford *v.* Brooks, 13 Ves. 138; Benson *v.* Bronson, 7 Johns. Ch. R. 202. 'Fraud and damage coupled together will entitle the injured party to relief in any court of justice.' Pasley *v.* Freeman.

§ 23. To constitute an express warranty, it is essential that the affirmation at the time should be intended as a warranty; otherwise the affirmation is merely the judgment or opinion of the vendor. Swett *v.* Colgate, 20 Johns. R. 196.

§ 24. But though in an action founded on a warranty of soundness, it is necessary to prove the warranty, yet it is enough to show the vendor's *intention* to warrant,—not necessary to prove it was made in *express* words. That is necessary only when the plt. proceeds on an express warranty. See a. 4, s. 3. Chapman *v.* Marsh, 19 Johns. R. 29—77.

§ 25. No particular form of words is necessary to constitute a warranty of goods, but must be express and positive; one the vendee relies on: 2. In common sales, where the vendee may examine the goods, the vendor is not answerable for any latent defects, without fraud or express warranty. Other points stated, many authorities examined by the court, &c. 4 Cowen, 440–445.

§ 4 *con.* But held, if A sell shingles not of the size prescribed by statute, and take the buyers note for the price, A cannot recover on the note. Written arguments; a long and much contested case: many authorities cited; the principal one, the shingles were sold in direct violation of the statute 1783, ch. 15: see ch. 196, a. 9. s. 3, ch. 40, a. 6, s. 20; 17 Mass. R. 258 to 281, Wheeler *v.* Russell. Art. 3. *Con.*

The plt. sold to the deft. leghorn hats at an agreed price, and of a certain quality, and then agreed to deliver extra crowns to suit the hats, free of charge: but the crowns sent did not match the hats. The deft. did not return, or offer to return the hats. King *v.* Paddock, 18 Johns. R. 144.

II. Ch. 62. Art. 3. *Con.*

The plt. sued for the price, and therefrom the deft., was allowed to deduct the amout of the loss she had sustained.

So in an action for the price of a chattel, the deft. may prove a deceit in the sale, and that the chattel was of no value, so defeat the plt's. action; or if the unsoundness produced only a partial diminution of the value, that the deft. may show in mitigation of damages claimed by the plt.

Beecker *v.* Vrooman, 13 Johns. R. 302.

So if a note be given for the price, and is sued, the deft. may show the deceit in the sale; and a fraudulent representation of the vendor, renders such note void. On the whole, the decision in Everet *v.* Gray, may be questioned, though in Kentucky the principle of it seems to have been adopted, as in *assumpsit* for goods sold. Held, it is not available in defence that the article purchased, is of less value than was represented, *if it was received*, and was of *any* value, and *was used by the deft.* And as to *the using*, this case does not support Everet *v.* Gray. The deft. may have accepted the gun locks before he could well know their defects; had *he used them*, the case had been more against him.

Sill *v.* Rood, 15 Johns. R. 230.

Allison *v.* Notte, 1 Litt. 279.

§ 10. *The shipper deceiving the master, &c.* A, the master, received diverse casks of lime on freight, consigned to him for sale, duly inspected and branded, and represented by B, the owner, as good lime, and the master sold it as such. In fact, it was of no value. The vendee sued A and recovered damages. A gave notice to B of the action, and sued him, and recovered the amount of the judgment against A, with all costs and expenses necessarily incurred in the defence of the suit of the vendee, A having faithfully and prudently defended it. In A's action against B, a copy of the judgment against A was deemed admissible evidence, though not exclusive. See Conner *v.* Henderson, 15 Mass. R. 319; cited ch. 122, a. 2 s. 18. The action of Henderson was for money had and received, &c. he having paid to Sevey the amount of the sales; but deceit was the essence of the action.

2 Greenl. 139–143, Henderson *v.* Sevey.

Art. 4. *Con.*

§ 3 *con.* Held, on a sale with warranty of soundness, or where, by the special terms of the contract, the vendee is at liberty to return the articles sold. An offer to return it is equivalent to an offer accepted by the vendor, and the contract being thereby rescinded, it is a defence to an action, for the purchase money brought by the vendor, and will entitle the vendee to recover it back if it has been paid: 2. But if the sale be absolute, and there be no subsequent consent to take back the article, the contract remains open and in force, and the vendee must sue on his warranty, unless it be proved the vendor knew of the unsoundness of the article, and the vendee tenders a return of it in a reasonable time: 3. If the sale be absolute, and the vendor afterwards consents *unconditionally* to take back the article,

12 Wheat. 183—193. Thornton, plt. in error *v.* Wynn.

the contract is at an end, as first above; and 1 Stark. 51; see a. 2, s. 23. II. Ch. 62. *Art.* 4. *Con.*

§ 23 *con.* But 1 N. H. Rep. 174–177, Reed *v.* Prentiss: *Assumpsit* on a note given by the deft. to the plt. for size the plt. sold the deft., was found to be bad; but no deceit, no fraud, or warranty; the plt. recovered; but said *ex gratia*, and authorities cited to each point, the defence had been good. 1. If the property had never passed to the vendee: 2. Had fraud been found to have been practised, or, 3. An express warranty broken. Jones *v.* Scriven, ch. 179, a. 9, s. 11; Kimball *v.* Cunningham, ch. 32, a. 4. s. 3; Parkinson *v.* Lee, ch. 62, a. 2, s. 17; Defreese *v.* Trumper, ch. 62, a. 4, s. 16; Emerson *v.* Brigham, ch. 62, a. 3, s. 8; Pollard *v.* Lyman, ch. 115, a. 4, s. 11; Holden *v.* Dakin, ch. 62, a. 4, s. 18, &c.; and cases herein cited, also, 2 Chitty's Pl. 100; 6 Johns. 5; 7 do. 331; 12 do. 363; 1 Johns. 96, 128, 274; 2 Johns. 179: 4 do. 421; 5 do. 354–402; 6 East. 110; all these are authorities on the point.

CHAPTER LXIII.

DEFAMATION.

§ 6 *con.* 1 Nott & M'Cord, 184, 185: to call one a mulatto is actionable *per se;* 1 Bay. 171; so the words 'you are a counterfeit;' 2 Con. R. 408. Art. 2. *Con.*

Words imputing weakness of intellect, are not actionable though spoken of a candidate for congress. So where words are innocent or justifiable, not actionable, though they may have created some special damage. Words that charge a woman with a breach of chastity, not actionable unless special damage be proved, nor to say she is a whore. 1 Nott & Mc Cord, 348–354. 2 Nott & Mc Cord, 204, 205. Con. R. 35.

The sense in which words are received by the world, is the sense courts of justice ought to ascribe to them in slander. 3 Serg. & R. 255.

It is actionable to say of another, he made and published a libel. But it seems it is not, to say he committed *an assault and battery, forcible entry, &c.* To call a woman a whore is actionable in Pennsylvania, without special damages for fornication is indictable, and includes moral turpitude, id., and 3 Serg. & R. 266. Words ought to be taken as the hearers understand them. 1 Nott & M'Cord, 216–290. 3 Serg. & R. 255. pp. 256–261.

§ 38. Calling a man *rogue and villain*, and saying he had ruined many families, and the curses of the widows and children were on him, and that he had wronged the deft's. father's estate, and cheated the deft's. brother Thomas, is actionable, though the plt. has stated in his declaration that he was a merchant at the time, &c.; and it was proved he was not a merchant. 4 Har. & Mc H. 537–539. Marshall *v.*

§ 39. So where the deft. called the plt. 'a bloody thief,' it was held these words were actionable, though accompanied by other expressions which made it doubtful if the deft. meant a charge of felony. Fisher *v.* Roberson, 2 M'Cord, 189.

§ 40. Slander of a witness in saying he handed papers to a juror to influence the jury, or to influence and bribe the jury. Held, this was defamation, as amounting to a charge of *embracery*, which is an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favor one side, by gifts or promises, threats or pursuasions, or to instruct them in the cause any other way, except by opening and enforcing the evidence by argument at the trial. Several counts, one bad general verdict, thereon judgment arrested.

§ 22. Loss of marriage. Declaration alledged a contract of marriage between the plt. and P. Baker, and that the deft. to prevent it, declared to Baker that he had had carnal intercourse with the plt., by reason whereof, B. refused to marry her. Verdict for the plt. for $1450. Motion in arrest of judgment for the insufficiency of the declaration, and for a new trial on a case: motion denied, and on the ground of *special* damage, Savage C. J., dissented. Seems, 1. Because her remedy was against Baker, who broke his contract of marriage: 2. The judge admitted improper evidence.

§ 28. Case for defamation; simply to burn one's own store is not unlawful; nor is it actionable to say A maliciously burnt his own store. To make his words actionable there must be a *colloquium* or an averment, stating such circumstances as will render such burning unlawful; and it must appear the words were spoken of, and concerning such circumstances; and the want of such *colloquium* or averment is not cured by an *innuendo*. There were no words in the declaration which charged the plt. with burning, or with a design to burn the property of another person, or his own property insured, but in the *innuendo*, which cannot enlarge, or add anything, but to make more clear by explanation the sense of the words averred, to have been spoken. The facts and circumstances which constitute the crime imputed, must be stated, and then it must be averred the words were spoken of, and concerning the plt.; Cowp. 672; see a. 5, s. 8, a. 8. s. 10, ch. 219, a. 1, s. 3.

§ 29. Nor in South Carolina is it actionable to call a woman a whore; 1 Const. Rep. 101: see sect. 20 above; remedy probably as in England.

§ 30. Nor are words charging the plt. with false swearing, or subornation of purjury, unless it appears by a colloquium, or by the words themselves, that they had reference to an oath, taken in the course of a judicial proceeding.

Count in slander charging the deft. uttered and published

these words, 'he,' (meaning the said I, the plt.) 'has been with a sow, and I, (meaning the said C, the deft,) can prove it; preceded and followed by a recital and averment that the words were intended to charge the plt. with the crime against nature, &c. Held, sufficient: 2. Where words are of doubtful import, the jury are to find their meaning: 3. The office of an *innuendo* is merely explanatory. It cannot enlarge the meaning of words beyond their natural signification. Verdict for the plt. Motion in arrest of judgment. Judgment for the plt. Judgment affirmed in the court of errors; 4 Cowen, 714. II. Ch. 63. *Art.* 5. *Con.* Goodrich *v.* Woolcott, 3 Cowen, 231—240.

§ 20 *con.* 1 Hop. Ch. R. 347–353, held, 1. *A newspaper establishment* is a subject of property and of contract, and a right to it may be protected in chancery. One who has sold out may only set up a *rival* paper, not *continue the former;* if doubtful which, no injunction issues, which is a writ to protect rights that are clear; at best, not reasonably doubted. One reason stated in the bill was, that Noah, the deft., was *insolvent*, and the plt. had no remedy but in prevention. 8 Ves. Jun. 215; 17 do. 336; and 4 Barn. & Cres. 35, as to libels. Art. 7. *Con.* Snowden *v.* Noah.

§ 27. This was an indictment for publishing an obscene book, entitled the 'Memoirs of a Woman of Pleasure,' &c. Held, it is sufficient to give a general description of the offence, or of the libel, and to aver its tendency, without copying the book, or minutely describing the prints. It can never be required to spread such a book, at large, on the record of the court. To do this the public itself would give permanency and notoriety to the indecency in order to punish it. The common pleas succeeds the sessions and has jurisdiction of libels. The book is in evidence: is the form of one count. Several counts—one good, and a general verdict is applied to the good one. 17 Mass. R. 336–340, Commonwealth *v.* Holmes.

§ 28. 2 Pick. R. 113–121, Clark *v.* Binney, held, the following publication was a libel. Binney, a public officer, in a report of an official investigation into his conduct, published the testimony of a witness with these comments: 'I am extremely loath to impute to A, (the witness,) or B, his partner, improper motives in regard to the false accusation against me, yet I cannot refrain from the remark, that if their motives have not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calumny, &c. has been such as to merit the reprobation of every man having a particle of virtue or honesty, &c.: they have both much to repent of for the groundless and base insinuations they have propagated against me:' 2. In an action for a libel a verdict will not be set aside for excessive damages, unless they are so

II. Ch. 63. *Art.* 7. *Con.*

flagrantly outrageous as manifestly to show that the jury were actuated by passion, partiality, prejudice, or corruption. The publication was in a pamphlet. Deft. pleaded a special justification. Jury, on issue, found a verdict for the plt. and $1000 damages. Motion in arrest of judgment on the ground the remarks were not libellous, and for a new trial because the damages were excessive. The court adopted the definition of a libel in Commonwealth *v.* Clapp. Judgment on the verdict.

2 Pick. R. 310 –316, Remington *v.* Congden.

§ 29. Case for a libel, published by the deft. concerning the plt. Plea not guilty. Held, 1. If a member consent the church may investigate any complaint made against him in writing, by a person not a member, no action lies against the person making the complaint, without showing express malice: 2. If the judge state to the jury there is no evidence of such malice, when there is some slight evidence of it, but not sufficient to support a verdict, this is not cause for a new trial: 3. Evidence tending to prove the truth of the charge in such complaint may be admitted under the general issue, for the purpose of showing probable cause for the complaint and rebutting the presumption of malice.

Sophia W. Bodwell *v.* Ben. Osgood.

§ 30. Case for a libel. Plea, general issue. The plt. was a young lady of good character, much employed in keeping school, &c. of good connexions, &c. Held, 1. A false complaint made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel, and the question of malice is for the jury. So held in the case of a letter from an inhabitant of a school district to the school committee accusing the schoolmistress of a want of chastity: 2. When one deliberately publishes a calumny, when he has no reason to believe it true, is conclusive evidence of malice. Deft. was a man of wealth and influence. Verdict was for $1400 damages, and a new trial refused.

4 Barn. & Cres. 35.

The delivery of a newspaper to the officer at the stamp office is a sufficient publication to support an indictment for a libel in that paper.

3 Barn. & Cres. 113.

Evidence in mitigation, &c. of damages. See ch. 63. a. 7. s. 9 *con.* In an action for a libel the deft. cannot, in bar of the action, or in mitigation of damages, give in evidence libels published of him by the plt. not distinctly relating to the same

p. 427.

subject. Case for slander. Deft. defaulted. Writ of inquiry. Plt. offered no evidence. Jury assessed £40 damages. Adjudged correct. See ch. 85. Evidence in mitigation of damages. See Matson *v.* Buck, 5 Cowen, 499, 500. Case for slander for saying of the plt. as a superintendent and soli-

citor of the Erie canal, 'he has cheated the State; he has taken a receipt for ten dollars and paid but one dollar; he has taken a receipt for thirteen dollars and paid but six dollars.' Held, the deft. could not show *in mitigation* of damages, or otherwise, that the charge was generally reported to be true. The court considered the reports as unfounded, because the deft. had attempted to prove them and failed. Relied much on Wolcott *v.* Hall, 6 Mass. R. 514. See s. 34. II. Ch. 63. *Art.* 7. *Con.*

Words must be proved as laid. It is not sufficient to prove equivalent words. Words to the same effect are not the same words. The plt. need not prove all the words on record; but he must prove so much of them as will support his action. The words must be stated and proved in substance. Fox *v.* Vanderbeck, 5 Cowen, 513–516.

§ 51. *Where the evidence varies from the plea*, the plt. has judgment, as 2 Barn. & Cres. 678, 679, Weaver *v.* Lloyd. Case for a libel published in an Oxford newspaper. The libel charged the plt. with various acts of cruelty to a horse, and, among others, with knocking out an eye. Deft. pleaded the charge was true in substance and effect. The jury found that it was true in all particulars, except that the eye was not knocked out. Held, the justification was not proved. Judgment for the plt. 1*s.* damage. Cited Edwards *v.* Bell, 1 Bing. 403. Art. 8. *Con.*

§ 52. In defamation, or slander, the deft. may show that the words charged were followed by others explanatory of the meaning, and modifying expressions, so as to render the words charged not actionable. 1 Const. Rep. 85.

§ 53. In a declaration for slander it is sufficient to state the substance of the words spoken; therefore it is sufficient to state that the deft. lately published and declared that the plt. had stolen his potatoes, &c. It is necessary to state and aver that the deft. spoke and published the slanderous words. 2 Mc Cord, 335.

§ 54. How far the deft. may justify speaking words he hears. It seems he may, if, at the time of speaking them, he names the person of whom he heard them, and if he did in fact hear them; but justification is not to bar the action, but only is admitted to prove there was no malice in the deft. when he spoke or repeated the words. Hence, if the deft. affirm the truth of the words, he is liable, though he adds he heard them uttered by another. As where the deft. said of the plt. 'he stole a cart,' but added that he heard the words spoken by A B; and the plt. may give in evidence the speaking of the same words by the deft. after the action is commenced. Miller *v.* Kerr, Mc Cord, 285. Id. Id.

§ 55. *Evidence of general character.* Defamation, for that the deft. had charged the plt. with arson, so being a thief and Paddock *v.* Salisbury, 2 Cowen, 811.

II. Ch. 63. *Art.* 8. *Con.*

stealing apples. Plea, not guilty. 1. Evidence of his general character was admitted in mitigation of damages under said issue: 2. *Secus*, it seems if the deft. justifies: 3. In slander, in penal action, actions for libel, and other actions, vindictive in their nature, a new trial will not be granted merely because the verdict is against the weight of evidence.

Damarest v. Haring, 6 Cowen, 76, 90.

§ 56. Case for defamation brought by a minister of the gospel, stated his situation, salary, &c. deft. intending, &c. on ——, at ——, said 'his sister P. had been delivered of a child, and that the domini was the father of said child, and he laid it on Timothy to clear himself, but he believed it was the domini's, and that the domini had desired him to make away with it,'—adding in the proper places the meanings, &c. Other counts varying, some stating special damages, &c. Plea, not guilty. The words were spoken in the low Dutch language, taken down from a witness, at the trial, by two ministers, and translated by sworn interpreters. The words were not proved; but many different words, in two conversations, but in substance to the same amount. Verdict for the plt. and motion in arrest of judgment. Motion denied. Many authorities were cited by counsel. The court held, 1. They 'take it for granted the words were proved as laid, and with the intention imputed' in the declaration: 2. Words are now to be construed according to their plain meaning and natural import, 'according to the ideas they are calculated to convey to those to whom they are addressed.' Cited Goodrich *v.* Woolcott, 3 Cowen, 239, &c.: 3. 'It is the province of the jury, when doubts arise, to decide whether the words were used maliciously, and with a view to defame;' 4. 'And for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of circumstances stated on the record, form a legal basis of an action:' 5. Courts and juries will understand them in the same way that other people would: 6. The words prove the plt. applied to the deft. to destroy the child, to commit murder, they prove something more than wicked intention, 'there is an *act* tending to carry such evil intention into effect:' 7. The words are actionable in themselves, whether spoken of a clergyman or other person: 8. The charge of incontinency against a clergyman is actionable. Sundry cases cited.

Walton v. Singleton, 7 Serg. & R. 451. Passie v. Monford, Cro. El. 797.— Preston v. Pinder, id. 30–32.

§ 57. Case for slander charging the plt. with the crime of adultery: 1. Plea, not guilty: 2. Special plea in justification. This adjudged bad. In it he admitted the speaking of the words. Held, this special plea might be used on the trial of the general issue as evidence to prove the speaking. Plt. produced no other evidence to prove the speaking of the

1 Pick. 1 to 19, Alderman v. French.

words charged: 2. Evidence of facts tending to show the words spoken were true, or of other facts of the same tendency, or of a general report that the plt. was guilty of said crime, cannot be received on such trial in mitigation of damages. See ch. 83. s. 33; Jackson *v.* Stetson, ch. 180. a. 3. s. 4. In the above case, Jackson, J. giving the opinion of the court at great length, said as to the first point, 'we have not been able to find any case in which this point is expressly settled.' See 5 Taunt. 233; ch. 171. a. 13. s. 13; ch. 171. a. 4. s. 4. The court said it was well settled, 'the jury are not to inquire of that which is agreed by the parties.' This is true where the parties agree, *and mean to agree*, in any fact or facts. But suppose the *apparent* agreement grows out of the mere forms of pleading, and especially in pleading double on the statute of Ann. See ch. 180. a. 3. s. 2. double pleading not allowed. One case not guilty and justification. 5 Serg. & R. 393. II. Ch. 63. *Art.* 8. *Con.*

Case somewhat similar, 3 Pick. 376—379, Sophia W. Bodwell *v.* Swan and wife.

§ 58. Case of defamation charging the plt. with theft. Plea of justification alone pleaded of the truth of the words spoken. Such case does not come within the statute 1826, ch. 107, s. 2. Hence if the deft. fail to establish his plea malice is to be inferred, and evidence that he spoke the words, believing them to be true, cannot be received in mitigation of damages. Said second section provides that in actions for slander, whenever the deft. may plead the general issue, and also in justification, that words spoken were true, such plea in justification shall not be held or taken as evidence that the deft. spoke such words. *Nor shall such plea of justification*, if the deft. fail to establish it, be of itself proof of the malice of such words, but the jury shall decide upon the whole case, whether such special plea was or was not made with malicious intent. It seems if the deft. had also pleaded the general issue, his case had been within said second section. 5 Pick. 296, 303, Hix *v.* Drury.

CHAPTER LXIV.

DISTURBANCE.

§ 19. *Common of pasture.* Common of estovers and of pasture, &c. exist in the State of New York. When common appurtenant belongs to land owned in common or parcenary, &c. all the owners must join in the common form in conveying such common. It descends to all the children of the in- Art. 3. *Con.* Leyman *v.* Abeel, 16 Johns. R. 30.

II. Ch. 64. Art. 3. Con.

testate, by statute law: 2. The grantee in fee of a right of common in *gross*, and without number, may alien it, and it descends to his heirs, but it cannot be conveyed in such a way as to give the entire right to several persons, to be enjoyed by them separately: 3. When this common in *gross* descends to several persons, as tenants in common, or parceners, it cannot be divided, but they must jointly enjoy it, and so convey it jointly.

Art. 4. Con.

§ 8 *con.* A fisherman lives in his boat in the summer; *his domicil* is in the place where he most usually resorts in the winter for board.

3 Greenl. 354. 4 Pick. 118—119.

§ 13. Action on statute 1822, c. 104, against a collector of taxes. Held, 15 days before the first Monday in March is the fixed time for his returning the list to the selectmen of the persons from whom he has received payment of a state or county tax, and the return cannot be made sooner.

CHAPTER LXV.

ESCAPES, FALSE RETURNS, AND RESCUES.

Art. 1. Con.

§ 3 *con.* 1 N. H. Rep. 138—139. No escape where the execution is not under seal. 2 N. H. Rep. 318—491, how arrest is made, &c.

§ 9. No action lies for an escape on mesne process, except when the plt. can maintain his original action against the prisoner. 1 Greenl. 68—73, Riggs *v.* Thatcher, sheriff, &c. Was a case of larceny. See Alexander *v.* Macauley, and Gunter *v.* Cleyton, this art. s. 6.

Art. 3. Con.

Lee *v.* Gansel.

§ 13 *con.* Same principle, Hubbard *v.* Mack, 17 John. R. 127; and 16 Johns. R. 287. In order to arrest a debtor, a sheriff may break open a warehouse or store, or barn not annexed to a dwelling house, or forming any part of the *curtilage*, as well as *inner* doors, of a dwelling house, trunks, chests, &c. To make a levy of goods valid, the sheriff must have them in his view and within his power, not enough to seize a few goods on the outside of a store, when others he means to levy are inside; he must break the door and enter, view all the goods and have them in his power, and generally he ought to make an inventory of them, id.

1 Bay. 358.

2 Serg. & R. 263.

§ 29. The sheriff may lawfully enter the deft's. house in a writ of replevin to search for goods, and if not found there he is not a trespasser.

2 Hawks. 246, State *v.* Armfield.

§ 30. An officer cannot break open an outer door or window to execute civil process; and if the door be partly closed by those within who are resisting his entrance, and the door be

not *entirely shut*, he is a trespasser if he oppose them with force and so enters.

§ 6 *con.* As to a demand on or performing a contract on Sunday, see ch. 177, a. 9, s. 9; as to sales on Sunday, see the cases collected. 1 Cowen 76.

§ 17 *con.* If a foreign consul be sued, and it does not appear in the proceeding he is such, and judgment by default in a *State* court, and *scire facias*, issued against his bail, he cannot object to the want of jurisdiction in the original action. 3 Pick. R. 80, Hall v. Young.

As to punishment *ex post fact.* see 2 Pick. R. 165—172.

§ 28. Debt against the deft. for the escape of one Ames, a *poor prisoner* committed on execution; deft. relied on Mass. Act, 1821, ch. 22, which provides when any person confined in a close prison on mesne process or execution, shall claim relief as a pauper, the keeper of the prison after 24 hours, shall furnish relief at the charge of the creditor. Held, the gaoler's demand of security for the board need not be made in any precise form, it is enough if understood by the creditor, &c. and that the debtor claim relief as a pauper. 3 Pick. 259, Blood, Jr. v. Austin, sheriff.

§ 29. A sheriff having a deft. in execution, is bound to obey a *habeas corpus* writ *ad testificandum*, and if in so doing he takes his prisoner out of his county, and returns him seasonably, it is no escape: 2. In such case he is not bound always to keep his prisoner in sight, or with the same strictness as before; and if the prisoner, of his own accord, goes about his own business a short time, out of the sheriff's view, it is no escape. Hassam v. Griffin, 18 Johns. R. 48.

Art. 7 Con.

It is a rescue if one take cattle from the lawful custody of a field driver he is driving to pound, though they are never out of his view, and are finally yielded to him, and they are impounded. 17 Mass. R. 342-345.

A debtor is arrested in Massachusetts, on mesne process, and escapes into New York, and is retaken on fresh pursuit, and is rescued by virtue of legal process in that State. This is no defence to an action against the sheriff in Massachusetts, for the escape from one of his deputies. 2 Pick. R. 304-310, Griffin v. Brown.

Art. 9. Con.

§ 12. *False return.* Case against the late sheriff of Surrey, for a false return of *nulla bona* to a writ of *fieri facias* endorsed to levy £203 upon the goods of R. Gooch; plea not guilty. The sheriff proved he seized all the debtor's goods under a *fieri facias*, sued out by one Knight, Dec. 17, 1824. Dec. 20, 1824, the plts. sued out their *fieri facias*, that his said seizure was before their writ was delivered to him. The plts. proved Knight's judgment was entered on a warrant of attorney, *fraudulently* executed by Gooch, to defeat the plt's. execution, and that they gave notice to the deft. to retain the proceeds of the goods levied. The deft. the first day of the next term was served with a rule to return the writ of *fieri facias* sued out by Knight; 5 Barn. & Cres. 660-667, Warmoll & al. v. Young.

II. Ch. 65. Art. 9. Con.

the deft. did not give notice to the plts. that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to Knight. Held, this was misconduct in the deft. and rendered him liable to plts. Warmoll and another. The jury found the *fraudulent* warrant of attorney; the 13 El. ch. 5, 'declares judgments fraudulently contrived with intent to delay creditors to be, as against them utterly void, and of none effect'—cited Dewey *v.* Boynton. 6 East 257; 2 D. & E. 603; Kempland *v.* Macauley, ch. 75, a. 16, s. 28; 2 Starkie, 218. Judgment against the deft. seems to have been, because he did not give notice to the plts. of the service on him of the six days' rule. This neglect the court thought was lending himself to one party against the other; court doubted if the sheriff was held to inquire into the validity of Knight's judgment.

Art. 11. Con.

§ 6 *con.* When the creditor gets judgment and execution against his debtor, he remains liable except, 1. He satisfies it: 2. His body is arrested and taken into custody, and is discharged and set free *by the plt's. consent:* 3. He be discharged by some statute, as of bankruptcy, insolvency, &c. So in Pennsylvania; where it seems the process of insolvency does not discharge the debt, but only the body.

3 Serg. & R. 465.

1 Cowen, 46, 47.

The officer takes the debtor's negotiable note for the amount of the execution; endorses the amount on it, and returns it satisfied, without any authority from the creditor or his attorney, the deft. is still liable to the plt. In such case the officer does not act in the regular and legal course of his official duty. Several cases cited showing when the debtor is discharged; and see s. 5. But 1 Cowen, 56–57; a *ca. sa. executed*, is a satisfaction of the debt, where not otherwise provided for by statute. The judgment debtors were imprisoned: see ch. 136, a. 17, s. 9 Foster *v.* Jackson; and Strange, 653.

1 N. H. Rep. 346, 347, State *v.* Smith.

§ 8. A criminal case. Held, an officer, for the purpose of serving a process in any criminal proceeding, may, after a demand and refusal to open the doors of a house, break them; and he may do this in the night as well as day: decided in the case of an indictment for resisting the officer, &c.

CHAPTER LXVI

FENCES.

Art. 1. Con.

§ 8. *Practice how proved.* Trespass for taking and carrying away the plt's. sheep, &c. Plea by the deft. he found them *damage feasant* in his close, and impounded them, &c. Replication, the sheep escaped from the plt's. close, adjoining to the deft's close into it, where his fence was defective. Deft. rejoined,

2 Greenl. 72—75, Heath *v.* Ricker & al.

'that the sheep did not escape through the deficiency of his fence,' and issue. Held, *parol* proof of usage in maintaining and repairing separate portions of partition fence, is admissible evidence to show prescription. The plt. offered a witness, to prove the deft. showed him which part of the fence was the plt's. and which was the deft's., and to prove the part the deft. showed as his, was in a ruinous condition, and wholly insufficient. The court below rejected the witness,—plt. excepted. Court above admitted his testimony. It seems the deft. might have demurred to the plt's. replication, because he did not specially reply a prescription. This in practice is a very useful and important case, and it may also be very convenient to have the manner of pleading in it, adopted in practice. When creatures escape from the lands of one man into those of another, it is almost daily inquiry through whose bad fence the escape is, and so whose fault, to find where the fault and defective fence is, and the escape through it, and the cause is, in fact, decided on its merits. Nothing is more simple and clearly understood than the making and repairing of partition fences, in practice.

II. Ch. 66. *Art.* 1. *Con.*

§ 9. *Fence by prescription*: 5 Pick. 503–506, Binney *v.* The Proprietors of the common and undivided lands in Hull, was debt on Massachusett's act 1785, ch. 52, to recover double the value of fence erected by the plt. between his land and that of the defts. The defts. pleaded that the plt. and those under whom he claims, have time out of mind, built, and still ought to build and maintain the division fence between the lands; and on this issue was joined. Held, 1. Evidence that the plt. and his ancestors had for 56 years maintained the fence: that 56 years ago, the fence was a bad one, and at that time the plt's. ancestor, being owner of the land, said it had been always maintained by himself and his ancestors. Held, sufficient to support the plea, that is, of *prescriptive* obligation on the plt. to maintain the fence: 2. Prescriptive obligation on the owner of land to maintain partition fence, is not destroyed by his becoming a tenant in common of the adjoining land. The plt. and his ancestors, time out of mind, owned and occupied eleven 144 parts of said common land the lands of both parties were improved lands. The proprietors of the common lands were incorporated by statute in 1811.

§ 1 *con.* The principles established in Rust *v.* Low, and Dovaston and Payne, are recognized, that is, the public have only a right to pass and repass in highways, and cannot turn their cattle thereon for the purpose of grazing; and if cattle so thereon escape into the adjoining land, it is no excuse to their owner, the fence is not sufficient.

Art. 3. *Con.* 16 Mass. R. 33—38.

II. Ch. 67.
Art. 2.
Con.

CHAPTER LXVII.

FERRIES.

§ 3. The colony law of 1641, describes two kinds of ferries, public and private: those which *pay rent to the country*, and those that do not; the last are *private property:* also grants 'the sole liberty of transporting passengers,' &c.; and 3 Bl. Com. 210; 'if a ferry is erected on a river so near to another ancient ferry, as to draw away its custom, it is a *nuisance* to the owner of the old one.' id. This was law in England as early as A. D. 1443: 22 Hen. 6–146: see the colony laws of 1641, 1644, 1646, 1647; C. and P. laws, pp. 110, 111.

Art. 3.
Con.

§ 3. A ferryman is liable as a common carrier, and by law he has a right to judge when it is safe and proper to pass over or not: was a special action on the case, against the deft. as *a common carrier*; and 1 M'Cord, 157, and statute of 1809; and as soon as a carriage is fairly on the slip or drop of a flat, though driven by its owner's servant, it is in the care and possession of the ferryman, and then he becomes liable for all damages, &c.

2 Nott & Mc Cord, 19—24. Cook v. Gourdin.

1 Mc Cord, 439.

An action lies for representing the plt's. ferry not so good as another rival ferry, and pursuading travellers to cross at the other and not at the plt's. ferry.

Johnson v. Hitchcock, 15 Johns. R. 185.

The county court may grant to a man the privilege of a ferry, though he does not own the land on either side of the river or creek, &c.

1 Murph. 279.

When A has a right to a ferry, and B sets up a free ferry in the neighbourhood, whereby A loses his profits, an injuction will not be granted to stay B's ferry, because A has an adequate remedy in a court of law. So A, the owner of an old established ferry, has a right of action against one who keeps, in his neighbourhood, a free ferry, or a toll ferry, and is not authorized by the county court to keep such ferry.

Long v. Merril, 2 Taylor 112.

2 Murph, 57.

CHAPTER LXVIII.

FISHERIES, FLATS, AND RIVERS.

Art. 1.
Con.

§ 2. And taking toll forty years, is evidence of *prescriptive* right: 2 Brod. & Bing. 403, Chad *v.* Tilsed; 1 Barn. & Ald. 662; 1 Conn. R. 382; and a right of fishery acquired by prescription is divisible; may be lost as to part, and preserved as to part; Rogers *v.* Allen, Camp. R. 309.

§ 3. Another general principle. Wherever the tide ebbs and flows, the right of fishing, as is that of navigation, is common to all. But in rivers above tide waters, the proprietors of the soil

have the exclusive right of fishing opposite to their land, to the middle of the river: 20 Johns. R. Hooker *v.* Cummings; and Merrit *v.* Brinkerhoff, 306; 15 Johns. R. 213, Platt *v.* Johnson. II. Ch. 68. *Art.* 1. *Con.*

§ 4. So granting an undivided share of a stream to A, does not empower him to use the stream to the injury of others jointly concerned in it; Vandenburgh *v.* Van Bergen, 13 Johns. R. 212.

The public fishery does not give fishermen a right to draw their nets on the flats; 14 Johns. R. 255, Brink *v.* Richtmyer.

§ 5. No person has a right to divert a water course on his own land, so as to turn it from the land of his neighbour lower down the stream. 4 Rand. 58–67.

§ 6. 5 Barn. & Cres. 875–886, Held, where a subject is owner of river or fishery in a navigable river, where the tide flows and reflows, granted to him, as must be presumed before *magna charta*, by the description of '*separalis piscaria*,' that is, *an incorporate*, and not a territorial hereditament, and a term for years in it, must be by deed: 2. It seems that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be owner of the soil.

§ 7. In New York, Gould *v.* James, 6 Cowen, 369–376, error; Gould, the plt., brought trespass against James, for entering his close at Lloyd's Neck, in the town of Oyster Bay, (Long Island) and catching, taking, and carrying away oysters. Plea, that the *locus in quo*, was at the time when, &c., a navigable river or arm of the sea, and a free fishery for any of the citizens of this State: the replication took issue on the facts; the plt. claimed the *locus in quo*, as belonging, in fee simple, to the inhabitants of Lloyd's Neck, and proved the plt. held exclusive possession of a farm under a lease from a tenant, by the curtesy, situated on said neck, and adjoining Lloyd's Harbour: so defined his possession on the flats. Three points decided: 1. Said inhabitants claiming *by prescription* an exclusive right of fishing for oysters opposite their respective farms, in said arm of the sea, and one of them being plt., as above, held, another of them interested as a remainder-man in a farm adjoining the *locus in quo*, was a witness for the plt. His proving the plt's. prescriptive right did not prove his own: 2. The inhabitants of Huntington claimed that the *locus in quo* was a free fishery for them. The deft., one of them, justified as above, held, the others were witnesses, though liable to actions for fishing there if he failed: 3. As to the right, the true principles are found in Carter *v.* Murcot; cited a. 2, s. 7. The law is the same in New York and England.

§ 3 *con.* These exceptions: 1. Tide waters, flats, fish, &c., therein remain, as at common law in New Hampshire, &c. See a. 9, the several States. Art. 2. *Con.*

II. Ch. 68. *Art.* 2. *Con.* If a town grant to A the privilege of fishing, condition the town shall grant no further privilege, but it grants a privilege to B, the town can have no action against A for the purchase money, though the sale to B be void, and though A join B in the use of his privilege. 4 Pick. 275–277.

§ 5 *con.* But it has been decided that bathing in the sea, &c. is not a common law right. Blundell *v.* Catterall, 5 Barn. & Ald. 91.

Nor will the court presume a grant of soil to a town under navigable waters. It must be proved. 6 Johns. 133.

New Jersey. *Rights in rivers, &c.*, have been much contested, and finally settled: Post *v.* Munn, 1 South. 61: held, in a navigable river, in which the tide ebbs and flows, the right of navigation is paramount to the right of fishing. Hence, the master of a vessel is not bound to change his course or slacken his sail for the convenience of a fishing net.

Arnold *v.* Mundy, 1 Hals. 1–94; in this important and late case, reported in 94 pages, several important matters are decided. 1. Navigable rivers, where the tides ebb and flow, the ports, bays, coasts of the sea, including land and water thereon, for passing and repassing, navigation, fishing, sustenance, and all other uses of the water and its products, are common to all the people of New Jersey. 2. By the grant of Charles II., to the Duke of York, those royalties, of which the rivers, ports, bays, and coasts were part, passed to the duke, as *governor* of the province, exercising the royal authority, and not as the *proprietor of the soil*, and for his own use: 3. Upon the revolution all those royal rights vested in the people of New Jersey, that is, the rights of *government:* 4. The proprietors of New Jersey did not under his grant, take such a property in the *soil* of navigable rivers in the State of New Jersey, that they could grant several fisheries therein: 5. A person who plants oysters in the bed of a navigable river *below low water mark*, has not such a property therein as to enable him to maintain trespass against a person taking them away, though the oyster bed is adjacent to his own shore. [Note, his bed was on the *channel* of a *tide* river.] 6. A grant of land bounded on a *fresh* water stream or river where there is no tide, extends *ad filum aquæ;* but a grant bounded on a navigable river, extends to the edge of the water only. Navigable river, here must mean *tide* river.

It is said, the duke did not grant the *soil;* and for a good reason; the king, the original proprietor of it, did not grant it to him: hence the duke (2 above) had it not to grant, and his mere right of *government*, in the resolution, passed, of course, to the State. This grant to the duke, is very different from the charter of W. & M. stated sect 3. above, on which I know of no judicial construction as yet made, as it now respects the different

States in the Union. By the reservation in this charter, rights vested in English subjects generally, to fish in all the tide waters. See said third section. II. Ch. 68. *Art.* 2. *Con.*

See much of the learning of this chapter repeated, and the authorities again cited in part, in the case of Jennings, 6 Cowen, 518—554.

§ 7 *con.* 17 John. R. 195, the People *v.* Platt & al. where a fishery belongs to several heirs they divide the profits by each taking his number of fish, and 20 John. 90, New York, adopts the common law doctrine, as to rivers not navigable; same in Connecticut, Adams *v.* Pease, 2 Conn. R. 481, and 5 Day, 72, a proprietor of land adjoining on Connecticut river, has an exclusive right to fish *on his own land;* but the right of fishing in that and other navigable rivers, *is free to all.* Lay *v.* King. This must mean *tide* waters, for in Adams *v.* Pease, cited above, it was held that owners of land adjoining navigable rivers *above tide water*, have the *exclusive right of fishing*, and the community have a right of passing them as *highways*, with every kind of water craft.

The right of fishing for shell fish on the land of an individual, between high and low water mark, is a public right, and does not belong exclusively to the owner of the land. Peck *v.* Lockwood, 5 Day, 21.

The bed of a navigable river and the water thereof, are common to all the citizens of the State; and where any person clears a fish place in the bed of the river and continues to occupy it, he acquires an exclusive right to fish in that place so long as he keeps up his occupation in the proper season for fishing, and 2 Conn. R. 584, a special right to the use of the water of a river, different from the general right, may be acquired by an adjoining proprietor, by grant, or by such length of time as will furnish presumptive evidence of a grant, and such occupancy or enjoyment need not have been *adverse* to those affected by it. The English and American rule is *high water mark*, of *ordinary* tides. Lord Hale, several places. Storer *v.* Freeman, &c. s. 4; Cortelyou *v.* Brundt, 2 John. R. 357, before cited; 2 Bl. Com. 14, this seems to be the true rule; 1 Serg. & Lowb. 240, &c., Miles *v.* Rose; 2 Conn. R. 481. Pitkin *v.* Olmsted, 1 Root. 217.

When lands are conveyed *as bounded on a river*, it extends to the centre of the stream; islands as in other such cases; nor can the parol declarations of former owners of the premises be admitted to contradict this construction of the deed of conveyance; but it may be shown by parol evidence, that the quantity of water was such on each side of an island in the river, as to be called by the name of the river; and then as a latent ambiguity, it may be explained by other testimony what 2 N. H. Rep. 369—373.

II. Ch. 68. *Art.* 2. *Con.*

the parties probably intended by the expression used in the deed; Claremont proprietors *v.* Carlton.

§ 10. Trespass for taking and carrying away mill logs. Held, Rivers and streams above the flood of the tide, if they have been long used for the passage of boats, rafts, and timber, are public highways, and, like other highways, are to be kept open and free from obstruction: 2. If the property of a person happen accidentally, to lodge on the land of another, or in waters of which he has the control as private property, the latter, in removing it from the premises, is bound to do it with as little injury as possible.

3 Greenl. 269–275, Berry & al. in error *v.* Carter.

2 N. H. Rep. 255, Bullen *v.* Runnels (see ch. 58, a. 2, s. 17.)

The conveyance of a part of a stream of water running between certain *termini*, passes a right to use all that part of the stream between those *termini*, and so much interest in the soil under the water, as is necessary to the use of it. Held, flowing water is *publici juris*, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore plt. (who complained the deft's. new erected dam disturbed the stream) could not recover damages for the mere erection of his dam, but the plt. was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.

2 Barn. & Cres. 910–917, Williams *v.* Morland.

See indictment for a nuisance in a river, ch. 208, a. 12.

§ 14 *con.* The king holds them in trust for his subjects, especially so in his Colonies, and when by his charters he granted tide waters and soils under the same, to the Colonies, the legislatures thereon acquired his powers, and they, and the Colonists, all the rights of property and legislation over the same, to be exercised as in a. 3.

Art. 3. *Con.*

§ 4 *con.* This law of 1641, does not apply to a grant of *thatch bank*, or land covered by the sea at high water. The plt's. grant was of a thatch lot; he sued the deft. for digging clams bedded on his lot and the channel. Held, also, the inhabitants of the town were not witnesses: see vol. 3, p. 415, (ch. 90, a. 4, s. 3.)

3 Pick. 357–360, Lufkin *v.* Haskell.

Art. 4. *Con.*

§ 3 *con.* In this case the true course was taken; it was left to the jury under the direction of the court, as a *fact*, if the deft's. wharf was an encroachment on the navigation privilege or not, where public and private rights may interfere or not, it is law the private must yield; but in collision, or not, beyond law and usage, it is a question of fact, depending on many circumstances.

A wharf that incommodes the public cannot be erected by a corporation, though it is to preserve a navigable river, and owns the soil. The navigation is a superior right, but if incommoded, or not, is a question a jury must so decide. This

was the question, and these the points in Rex *v.* Lord Grosvenor and others, 3 Serg. & Lowb. 453, and 2 Stark. 510, was an indictment, and the defts. were permitted to attempt to prove to the jury their embankment was a benefit to the navigation of the river, (Thames) but the whole evidence proved it was a nuisance, and made the navigation less convenient, &c. and 1 Dal. 150. II. Ch. 68. *Art.* 4. *Con.*

§ 7. *Land not appurtenant to land.* Trover for 2 barges distrained by the deft. on the river Thames, lying between high and low water mark, and attached by a rope to a wharf as to which the rent was due. Special verdict stated that the exclusive use of the land between high and low water mark, whether dry, or covered with water, was demised as appurtenant to the wharf, but that the *land itself* between high and low water mark, was not demised. Held, if from this finding it was to be inferred that the exclusive *use* was appurtenant, it would be a mere easement or privilege, out of which no rent could issue, and if the finding meant the land between high and low water mark was appurtenant to the wharf, it was the same as finding one piece of land was appurtenant to another, which, in point of law, could not be. 8 Barn. & Cres. 141.

§ 10. Added further authorities: 17 John. 195; 20 id. 90; Hop. Ch. R. 416–421; 3 Greenl. 74–76; Ch. 79, a. 2, s. 9, 10, how far usage gives public rights in rivers. *Art.* 6. *Con.*

§ 8. See also acts of Congress as to the fisheries, July 29, 1813; February 9, 1816; April 4, 1818; March 3, 1819. In these long acts important provisions are made. *Art.* 8. *Con.*

Held, the shipping papers founded on the aforesaid several acts of Congress, do not conclusively determine who are the owners, nor with whom the contract is made; but a seaman may have his remedy for his share of the fish taken against all the owners, and he may show those he sues to be owners by other evidence than the vessels papers, and by parol and other evidence. By act 13, Congress sess. 1, ch. 2, it is provided, that nothing therein contained, shall prevent any fisherman from having his action at common law, for his share or shares of the fish or the proceeds thereof. 4 Pick. 298—302, Wait *v.* Gibbs & al.

§ 2. On the general principle the king in his charters established in New England, the citizens of one State have a right to fish, &c. in the tide waters of other States, unless excluded by something special in those charters, or by Colony or State laws. In this respect we may take the States in the usual order. *Art.* 9. *Con.*

Maine is in the same situation Massachsetts is.

New Hampshirer emains at common law.

Rhode Island, the same generally.

II. Ch. 68. Art. 9. Con.

Connecticut, on the ground of Austin *v.* Carter, and a. 5, s. 2, 1 Swift's System, 841; 1 Conn. R. 382--510; 5 Day, 22.

New York, see Cortelyou *v.* Bundt, see a. 2, s. 7; 2 John. R. 313; 1 Caines R. 543, varies some from the common law.

New Jersey, exception as to navigation tide waters, soil under them and all therein, are private property of the adjoining owners, in which there is dower, curtesy and ejectment lies, &c.; but see ante, a. 2, s. 5.

Pennsylvania, fisheries regulated by statutes.

Delaware, fishery seems to be by usage, and varying from the common law.

Maryland, king in his charter reserved fishing, &c. to his subjects of England and Ireland; by fair construction, it seems to the people of Maryland also, 1 Har. & M'H. 564-565.

Virginia, as above; a law of the State enacted February 16, 1819, saving the navigation, extends the rights of the owners of the lands adjoining salt waters, to low water mark.

North Carolina, } remain at common law, no statutes or
South Carolina, } decisions.

Georgia, (see below) as in Virginia, except in Georgia, fishing is by usage and statute.

Alabama, }
Mississippi, } remain at common law.

Louisiana, fishing, &c. is mainly by the civil law.

The other States do not border on tide waters; See 3 & 4 Ann, law Reg.; Hall's law Journal; Angel, on Tide Waters, octavo vol. published in the year 1826; also in this work, many other important matters as to tide waters, and the various rights in them.

1 M'Cord, 580. South Carolina. The rule of the English common law, that no river is navigable, except where the tide ebbs and flows, is not applicable to South Carolina: 2. A river is not public when so naturally obstructed, as there is no passage for any boats: 3. But if capable of being made navigable, the public may use its waters, but this does not impair the right of the individual to the soil and use of the waters as far as is consistent with the public right.

CHAPTER LXIX.

AS TO LANDS.

Art. 2. Con.

§ 1 *con.* 3 Camp. 514. It is said one may lose his right as to lights, by twenty years non-user; hence ancient windows, shut up twenty years, lose their former right.

But, 3 Greenl. 120–126, Tinkham *v.* Arnold, the undisturbed enjoyment of *any known legal right*, such as flowing of lands for the support of mills, &c. for any term of time, furnishes no presumptive evidence of a grant: 2. The presumption arises only in cases where the user or occupancy would otherwise be unlawful: 3. Where a legal title to hold lands is disclosed, the party is not admitted to say he holds by wrong: 4. In a case reserved on the report of the judge, no point is open to the parties except those appearing in the report. The deft. by his milldam had flowed the lands about forty years, but his right to flow commenced under a deed, March 1, 1783; deft. cited Holcraft *v.* Heal; Bealy *v.* Shaw; Wild *v.* Homby, &c. &c.; the presumption of a grant of easement, &c. in the land of another, is grounded on his long acquiescence, knowing of the *adverse* use. Stearns, 240; the statute of 1714 made the flowing *lawful*. See ch. 74, a. 10.

§ 5. Case for diverting water from the plt's. mill. The principle settled was that the owner of land bordering on a stream has no right to divert the water for the purposes of irrigation, and thereby diminish the quantity which has been accustomed to flow to a mill of 40 years standing, so as to impede its operation after the plt. had enjoyed the stream above 30 years. The deft. very much enlarged the outlets for irrigation. 3 Pick. 269–272, Cook *v.* Hull.

§ 8 *con.* This was case for digging down the street before the plt's. dwelling house in Boston and taking away the earth so as to lay bare the foundation wall of the house, and to endanger its falling, whereby the plt. was put to great expense to build up new walls, &c. The deft., a surveyor, pleaded not guilty, and filed a brief statement of facts; plt. proved the digging, and his expense, &c. His house was built about twenty years before the trial, and after the street was laid out. Held, 1. The stat. of 1786, a. 81, s. 2, as to the selectmen's assigning limits to surveyors of highways, respectively, is only directory: 2. A surveyor has power, by the statute, to dig down or raise a street, and if he does it with discretion and not wantonly, the party injured has no action: 3. Such digging down or raising is not an *alteration* within the meaning of the act: 4. Amending as used in it comprehends *making better*: 5. The statute is not contrary to the 10th article of the *bill of rights* which has never been construed to give a right to compensation for an indirect or consequential damage or expense resulting from the right use of property already belonging to the public. By the first sect. of this act, surveyors have power to remove 'trees, bushes, stones, fences, rails, gates, bars, inclosures or other matter or thing that shall any way straiten, hurt, hinder, or incommode the highway or townway,' to dig for materials in lands not planted or inclosed, &c. 'provided no surveyor of highways shall cause 1 Pick. R. 418–435, Callender *v.* Marsh.

II. Ch. 69. Art. 2. *Con.*

any water course, occasioned by the wash of any highway or townway to be so conveyed by the side of such highway as to incommode any person's house, &c. without the consent of the selectmen.' The first section also provides highways and townways 'be kept in *repair* and *amended*, from time to time, that the same may be *safe and convenient* for travellers, with their horses, teams, carts, and carriages,' &c. at the town's expense. 'If the public safety and convenience require the levelling of the road, he, (the surveyor,) must do it with as much care in relation to property, bordering on the road, as it is possible for him to use;' if he do not he is liable, &c.

16 Mass. R. 215.

1 Hop. Ch. R. 416–421, Reid & al. v. Gifford, &c.

Similar principles, as to water courses, as above. If several proprietors on the same stream have it diverted to their injury, and their rights being clear and ancient, they can join in the same proceeding, in equity. The general principle established is that when two or more persons have a stream running through their lands, no one has a right to divert it from its ancient and natural course.

§ 17 *con. Thirtyeight years deemed ancient*—As where the plt. and deft. had adjoining lands; the plt's. house was about four feet from the boundary, (this made no difference.) Some witnesses had known it thirtyeight years, and during that time the plt's. windows looked towards the deft's. land. Long before he bought it, it had belonged to a family living at a distance; no proof that family ever saw it, and it had been occupied by the same tenants the last twenty years. About two years before this action on the case was brought, for obstructing the plt's. ancient windows, the deft. purchased the lot and built on it a house, and thereby darkened the plt's. rooms. Held, that after an enjoyment of thirtyeight years in the absence of any contradictory evidence, the windows were to be deemed ancient windows. Judgment for the plt. 2 Barn. & Cres. 686–691, Cross *v.* Lewis. See ch. 74, a. 10, s. 2. 3 Barn. & Cres. 332–341, Moore *v.* Rawson, &c.—Case of obstructing lights; plea not guilty. Held, as a right to light is acquired by enjoyment, it may be lost by the discontinuance of the enjoyment. In this case lost in seventeen years; but it is preserved if the party who ceases to use it, at the same time does some act to shew he means to regain it in a reasonable time.

2 Pick. R. 325–330, Worcester, inhabitants of, *v.* Green.

§ 19. Words that convey an *easement* and not the *land*. In 1733 the *proprietors* of Worcester 'voted that one hundred acres of the poorest land on mill stone hill be left common for the use of the town for building-stones.' Held, these words only conveyed an *easement* to the town or the inhabitants, and that the *land itself* did not pass: 2. These parties were not affected by a judgment between said *proprietors* and one under whom the deft. claimed; the *plts.* were not parties to that suit,

and estoppels must be mutual. A grant of mines of *vestura terræ*, of *herbagium terræ*, to dig turf, does not grant the land or fee. Co. Lit. 4, 164; 1 Taun. 529; 4 East 469; 1 Ventr. 393. II. Ch. 69. *Art.* 2. *Con.*

§ 20. Case for obstructing and diverting a water course. The owner of land through which a stream flows, diverts it to irrigate his land, without returning the surplus into the natural channel, whereby the owner of the land below, entitled to use the water in the same manner, is deprived of his privilege; the owner so diverting the water is liable to an action. This case differs from Weston *v.* Alden, which has been questioned. 5 Pick. 175—177, Anthony v. Lapham.

§ 11 *con.* Error from the Common Pleas. If a tenant make repairs, he cannot recover of his landlord, unless there be a special agreement to pay for them: 2. Nor has one tenant in common against another, *assumpsit* for repairs, though necessary, without a previous request to join in the repairs made, and a refusal by the one to be charged: 3. *Quere*, if *assumpsit* be the proper remedy. Art. 4. *Con.* Mumford v. Brown, 6 Cowen, 475–477.

CHAPTER LXX.

MALICIOUS PROSECUTIONS.

§ 1. 4 Hall's Law Journal, 102; 3 Esp. 7; Cro. El. 871; Yelv. 105; 6 Mod. 25—73. Shewing that *malice*, and want of *probable cause*, are both necessary to support this action, for a malicious prosecution. *Art.* 1. *Con.*

§ 11. Case for maliciously arresting the plt. and holding him to bail in a civil action, in $10,000. The main defence was that Little acted by advice of counsel, and so to prove no malice. The court decided that such advice can avail only when given on a true state of facts, and before the action, supposed to be malicious, is commenced. 3 Mason 102–107, Blunt v. Little.

§ 12. *Want of probable cause.* Held, 1. The essential foundation of this action is that the plt. has been prosecuted without *probable cause*: 2. This, in general, may be understood to be such conduct on the accused's part, as may induce the court to infer the prosecution was undertaken from public motives: 3. Whether the circumstances relied on to prove the existence of probable cause be true or not, is a fact to be found by the jury: 4. But whether, if found to be true, they amount to probable cause, is a question of law, many authorities cited; generally found in this chapter; need not be here cited. 1 Greenl. 135–139, Ulmer v. Loland.

§ 13. Where a party acts *bona fide* in consulting counsel, and pursuant to his advice, commences a suit, believing he has good cause of action, he will not be answerable in an action for a malicious suit. 4 Hall's L. J. 102; 1 Esp. 7; Cro. El. 871; Yel. 105; 6 Mod. 25–73. 2 Pick 389—394, Stone v. Swift, Jun.

II. Ch. 70. *Art.* 1. *Con.*

§ 14. Mills *v.* McCoy & wife, 4 Cowen 106—411. Case for slander and malicious prosecution. In a declaration for a malicious prosecution, setting forth a search warrant, detention, indictment, and acquittal, the search warrant, detention, &c. are mere matters of inducement, and need not be proved: 2. Declaring the search warrant commanded to bring the person, whereas it commanded to bring both the person and the goods, is no material variance. The declaration not professing to set forth the search warrant in *hæc verba*: 3. Declaring the deft. caused the plt. to be carried before O, and detained till she gave bail; whereas she was in fact committed for want of sureties by H, and afterwards brought before O, and bailed, is no variation: 4. Declaring that the plt. was committed on an indictment, and that the prosecution was ended and determined, and stating a judgment of court to this effect, whereas the record stopped with a verdict of not guilty, and did not contain any judgment of acquittal, is no variance: 5. On a verdict of acquittal, if the deft. be in prison, he is immediately discharged and if out on bail, his recognizance is *ipso facto*, discharged without any further entry.

8 East 328; 7 Taunt. 399; 4 D. & E. 590.

Art. 2. *Con.*

§ 7. Case for a malicious arrest. It appears there were mutual dealings between the plt. and deft., and items known to be due on each side of the account. Held, on the English statute of set-off, that in such a case the balance only is the proper debt for which the party is to be arrested; balance here £5. Arrest for £20. The charges of the deft., plt. in the first action, were over £20. And as he arrested for the £23, the action was malicious, and without probable cause. So Dronefield *v.* Archer, 5 B. & A. 513; otherwise a nisi prius case, Brown *v.* Pigeon, 2 Campb. 594. See 4 Bur. 1996.

3 Barn. & Cres. 139–144, Austin v. Debnam.

§ 8. This action lies if the deft. maliciously, and with intent to vex, distress, and impoverish the plt. directs the sheriff to levy near double the sum due on a judgment obtained by the deft., but the plt. must prove an injury and damage to himself, occasioned by some malicious act of the deft.; but malice may be inferred.

4 Serg. & R. 19.

Art. 8. *Con.*

§ 1 *con.* In this action it is a good defence that the deft., when he caused the plt. to be arrested, acted *bona fide* on the opinion of a legal adviser of competent skill and ability, and believed he had a good cause of action against the plt.; but if any indirect motive appear in making the arrest, it may be left to the jury to decide if the deft. so acted. Jury found he did not so act.

2 Barn. & Cres. 693.

1 Cowen, 600.

§ 19. In such case, the venue will be changed to the county where the cause of action arose, disregarding the number of witnesses, unless the plt. will stipulate to give material evidence, arising in the county where he has laid his venue.

CHAPTER LXXI.

MILLS, LANDS FLOWED, MILL STREAMS.

Twenty years' possession—how evidence of title. See the words *Twenty Years* in the Index, also ch. 104, a. 4.; ch. 94; ch. 178. a. 21.

§ 13. The general position is that the quiet enjoyment of a water course, &c. twenty years, gives a right, as to *private* property—not against the *public: a title is presumed*. This is quite a modern doctrine, and respects *incorporeal* rights. See 2 Saund. by Wms. Yard *v.* Ford, 175. a. b. c. d. e. Williams states the individual opinions of several judges, and the case of Holcroft *v.* Heel, 1 Bos. & P. 400; see ch. 74, a. 10; ch. 45, a. 1, s. 6; a. 2, s. 15.

§ 14. Baltson *v.* Bensted, 1 Campbell, 463, held, as to spring of water, that twenty years exclusive enjoyment of water in any particular manner, affords a conclusive *presumption* of right to the party so enjoying it.

§ 15. Lord Mansfield said a jury may presume the fact for the purpose of quieting a long possession. This does not refer in any particular to twenty years. This case, ch. 94, a. 2, s. 11; a. 4, s. 4. Cowp. 215.

A tenant for life cannot grant an easement so as to affect the reversioner, hence such grant will not be presumed; but if the tenant long yield a valuable interest, there may be a presumption against him, and also his lessor. 4 Barn. & Ald. 579. 11 East, 374.

§ 16. The most material question is, whether twenty years possession is a bar to an action, or to be left to a jury on the evidence to *presume* a grant. The better inference is, it is so left, and is not a bar as in the acts of limitation. 2 Saund. by Wms. 175; Cowp. 102, Mayor of Kingston *v.* Horner. So left to presume on 350 years' possession; cited ch. 161, a. 11, s. 1; Cowper, 215, same principle; before cited, 13 East, 339. In fact all these cases rest on the ground of *presumption*, in which there must be a jury to presume if the deft. require one, but acts of limitation are positive bars, and without trial by jury. So ch. 179, a. 19, s. 35, 36, the same ground of presumption is relied upon, 'where circumstances may reasonably justify it.' See 12 Ves. 286, Gray *v.* Bond; 2 Brod. & Bing. 667; 1 Simons & Stuart's R. 190, 203, Wright *v.* Howard.

§ 17. Adverse possession of an equity of redemption for twenty years is a bar. Nor is there any relief in equity after twenty years, even in cases analogous to those in which a writ of right would lie at law. Nor after twenty years will 2 Jacob & W. 191. p. 192. p. 223.

III. Ch. 71. *Art.* 2. *Con.*

equity allow the mortgagee to sell under a trust, when he has had no possession and there has been no payment of interest, no demand and no acknowledgment within that period.

5 Pick. 182–184, Avery v. Van Ducsen.

§ 18. Complaint, for overflowing the meadow of the complainant, against a mill owner. On a trial in court, on a particular day and on particular days before and after to the date of the complaint, the evidence it seems is confined to the specified period: 2. And the jury, in deciding if any damages be sustained, may consider any benefits derived from the overflowing. First plea, not guilty. Second, the overflowing did not do any damage. Issues on both. See stat. 1824, ch. 153, s. 3, allowing the jury to consider such benefit. This statute enacts the sound principle of the common law. See Ways, ch. 79.

5 Pick. 292–295, Wolcott, W. M. Co. & al. v Upham.

§ 19. Trespass. Held, a mill owner may create a reservoir of water for the benefit of his mill by erecting a dam remote from that on which the mill is, and the owner of land lying between the two dams, overflowed by the water from the reservoir, must apply for damages in the mode pointed out in the statute 1795, ch. 74. The upper dam was three miles above the lower one.

Art. 4. *Con.*

17 Mass. R. 76-80, Johnson v. Kitteridge & al.

§ 1 *con.* Complaint by the owner of meadows in Andover *v.* mill owners, for flowing, &c. Held, the verdict and judgment under the mill act is final on both parties as to the height of the dam and the portion of the year the flowing may be, except in certain cases, as where the mill owner may have erected new mills or introduced new machinery into the old mills, requiring a greater head of water to work them; and 17 Mass. R. 443.

2 Mason, 280, Whitin v. Alney & al.

A devise of a mill with the appurtenances, conveys with it, the land under and adjoining it, necessary to its use, and actually used with it. Also see 6 Mass. R. 332; 1 Bos. & P. 53; Cro. Car. 17, 57, 168; 3 Wils. 141; 2 W. Bl. 1148; 2 D. & E. 498–504; Com. D. Grant E. 9, 10; 17 John. R. 213.

§ 4 *con. Irrigation.* How far this may be extended is a question in the books. Mr Angell, in his treatise on *water courses*, pages 31 to 39, published A. D. 1824, denies Weston *v.* Alden, and similar cases in Connecticut, to be law; and thinks them overruled by the decisions in Hodges *v.* Raymond, cited a. 5, s. 18, and Colburn *v.* Richards, cited a. 3, s. 7, ante. The first was a dispute about a *milldam*. The second was about *mills* and *flowing*, and the court thought Weston *v.* Alden did not apply. Mr Angell appears to be better supported by the established principle of the common law, and English authorities; as Beasley *v.* Shaw, 6

East, 208 to 219; Shury *v.* Piggot, Bulstrode, 339, cited Angell's Appendix, 181, 184, and pages 192–195, Street *v.* Bovington & al. 5 Espin. R. 56; Palm *v.* Heblethwait, Skinner's R. 65–175; Sands *v.* Trefuses, Cro. Car. 575; Brown *v.* Best, cited art. 2, s. 1; Palmer *v.* Mulligan, 3 Caines' R. 307 to 320; Palmer's R. 290, Bowler's case; Jebb *v.* Povey, 1 Esp. 679. In these and a few other cases, of less importance, cited by Mr Angell, only one appears to respect irrigation, and that rather turned on the pleadings; but all tend to show that where there is a stream of water in which each of several persons has an interest, or use, no one of them can vary the usage without consent of the others, expressed directly, or proved by usage among them a sufficient length of time, usually twenty years, where the party encroached on has *knowingly* yielded a *real* interest or *beneficial* use *all* that time. The law arises on the acquiescence of the party encroached upon so long a time, wherein all the mean time he yields a real interest, and if he has title has real cause or reasons to resist the encroachment.

Art. 5. Con.

§ 1. *Case for diverting the stream, &c. lies.* A was seised of an ancient mill with a stream of water turned out of a river and flowing to his mill, and B possessed of other mills with a stream turning out of the same river, above A's stream, by means of a head wear flowing through A's land to B's mills as appurtenant thereto. B erected on other lands below A's land, and near the said water course, two other mills, hence wanting more water he widened and deepened his water course in A's land and raised said head wear, and thereby so deprived A's mill of water that it became of no use. A sued B and recovered damages.

4 Barn. & Cres. 8, Davis *v.* Morgan.

§ 19. A erects a mill, afterwards B erects one *above*, this is injured by back water caused by A's dam. B has no cause of action. Hatch *v.* Dwight, 17 Mass. R. 289–299; Saunders *v.* Newman, Barn. & Ald. 258; Vandenburgh *v.* Van Bergen, 13 John. R. 212.

If A acquire a right, by a dam, of a certain height to raise back water, he may keep it back longer than usual, if he do not raise it higher than usual. The action was for flowing the plt's. meadows; and it seems the longer flowing was occasioned by the mill works of the defts. being made tighter and being kept in better repair than thirty years before.

Alder *v.* Avil & al. 5 Taunt. 454.

The true common law principle *aqua currit et debet currere.* 1 Coxe's R. 460–466.

Case for obstructing a mill and flowing back the water by means of a dam across the water course lower down, &c. Plea, not guilty B, owner of the lower dam, lowers it two

3 Mason, 272-280, Hazard *v.* Robinson.

III. Ch. 7. 1. *Art.* 5. *Con.*

feet, and it remained so thirtyeight years. During this period the upper mill is not obstructed, owned by A. B then sells the lower mill to A, who afterwards sells the lower mill to C. Held, by lapse of time and *unity of possession*, the right to raise the lower dam two feet was gone. The decision proceeded on the presumption of a grant in the thirtyeight years. And the court said, as 'to incorporeal hereditaments and easements, such as ways and water privileges, the rule of law is well established, that an uninterrupted possession and use *for twenty years* is *prima facie*, and, if unexplained, conclusive evidence of a right.' 'A right of water course does not seem to be extinguished by *unity of possession* in any case.' For it is *ex jure naturæ* and not by *prescription*. See 11 H. 7. 25. Otherwise, if during the unity of the possession the water course be destroyed. Cro. J. 121, Nicholas *v.* Chamberlain. See the Civil Code of Louisiana, art. 801—810, word *servitudes*, art. 801 is thus—Every servitude is extinguished when the estate to which it is due, and the estate owing it are united in the same hands. But it is necessary the *whole* of the two estates do belong to the same proprietor. Other articles admit a suspension, or an extinguishment according to circumstances.

Bul. N. P. 74. —Surry *v.* Pigott, Popham, 166.

CHAPTER LXXII.

MISFEASANCE.

Art. 1. *Con.*

§ 14 *con.* Trespass for killing the dog of Emerson commenced before a justice. Held, 1. If one's dog chases or worries cattle, an action lies against him, if he have notice the dog is in the habit of doing this: 2. No one has a right for this reason to kill the dog, except he worry sheep; and so the case is brought within the statute, 1 R. L. 169: 3. To justify killing him, (except as to sheep,) it must be shown he could not otherwise be separated: 4. When a dog attacks persons, he may be killed as a common nuisance: 5. So if he attack, and actually kills domestic animals on the owner's land: see ch. 180, a. 10, s. 46; 3 Lev. 28; 1 Saund. 84; 13 Johns. 312.

Hinkley *v.* Emerson, 4 Cowen, 351—358.

Art. 3. *Con.*

§ 8 *Revenue*, further cases.

Debt lies in favor of the United States against the importer, for duties on goods imported: 2. So if he smuggles goods: 3. So where short duties only have been paid: 4. So where the duties are not paid by mistake, accident, or fraud, and no bond is given to secure them: 5. Information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy for the United States, for the duties where goods have

been smuggled; so in said third and fourth cases: 6. The right to duties accrues on the importation, with intention to unlade, and they become a personal charge and debt on the importer: 7. A bond taken to secure them, due by the importer, does not extinguish the debt so accrued; only secures the payment: 8. Only the owner or consignee, or his agent, can enter and bond goods: 9. And such bond can be taken only from persons legally entitled to enter them. III. Ch. 72. *Art.* 3. *Con.* United States v Lyman, 1 Mason, 482–508.

§ 9. In case of a seizure by the collector for a breach of the revenue laws, after a final condemnation not appealed from, the secretary of the treasury has no power to remit the collector's share of the forfeiture. It is a vested and absolute right. When higher security is given for duties, it *prima facie* extinguishes the debt arising on importation. Not so when the bond is given by a third person. 1 Mason, 431. The brig Hollen. 1 Mason, 482.

§ 10. *Valuation of taxable goods.* Held, an appraisement regularly made under the act of congress of 18th of April 1818, ch. 74, for the purpose of ascertaining the value of goods subject to an *ad valorem* duty, is conclusive as to the value on which the duty is to be estimated: 2. That act is strictly constitutional: 3. It has not changed the basis of the valuation on which duties are, ordinarily, to be estimated. The 'actual cost,' is still the true basis; and an appraisement under the eleventh section, is never to be ordered by the collector, unless he, personally, suspects that the invoice is undervalued; for that section applies only to fraudulent invoices. Congress has power 'to lay and collect taxes and duties;' hence may prescribe 'the manner in which duties shall be levied, and the value of the goods shall be ascertained,' &c. Said act of 1818, 'is an uniform law in the sense of the constitution, in relation to duties, for it is in its terms equally applicable to all parts of the United States, and makes no distinction between them.' 2 Mason, 392–407, Tappan & al. in error, v. United States.

§ 11. Silver dollars are 'goods, wares, and merchandise,' within the fiftieth section of the revenue act of 3d March, 1799, ch. 128, for the landing of which a permit from the custom-house is necessary. This section requires such a permit for landing all goods exceeding $400 in value. 3 Mason, 98, manner of calculating duties on the act of 1818, ch. 74, pages 331–333.

§ 12. Sheriff's sale of land for taxes. The purchaser must see the officer exactly pursued the power the law gave him, and all the steps of the law, in the case. 4 Rand. 585–597: see ch. 136, a. 15, s. 4, &c.; Greenl. 339–349, void in part, void in all.

§ 13. Sale of land for direct tax of the year 1812. *Entry sur disseisin*, tenant claimed under such a sale; the plt. the original owner. Held, 1. Not necessary the deft. show the collector

III. Ch. 72. Art. 1. Con.

had given bond, &c., this being only for the security of the United States: 2. The administering the oath of office to the assistant assessor, may be proved by *parol:* his oath. As to filing a certificate of his oath in the collector's office, the act of congress is merely directory. Act July 22, 1813, s. 3.

2 Greenl. 375—377.

§ 14. *Over assessment, though small, makes* the tax void; as where the assessment exceeded the sum voted to be raised, and five per cent. thereon, though the excess be of a few cents only, the whole is void, and the assessors are liable in *trespass*, to the party whose goods have been distrained for the tax. Tax in a school district in Belfast: excess 87 cents.

2 Greenl. 378—381, Stubbs v. Page.

§ 15. *The collector's covenant; its construction;* this in his deed, 'that the taxes aforesaid were assessed and published, and notice of the intended sale of the said lands given according to law,' is a stipulation, not only that the taxes were in fact assessed, but that the assessment was *legally made.* When a deed conveys no seisin in deed or fact, the measure of damages is the consideration money and interest. The collector covenanted he had good right and full power, to sell and convey to the plt. to hold as aforesaid. As no seisin passed, the plt. could not recover the costs of the owner's action against him: see Cushman *v.* Blanchard.

§ 16. Where a tax is assessed on A, and it is acknowledged to be due, and his land is sold for it to B, he need, in ejectment brought against him by A, only show the sheriff's deed of the land. Where a man neglects or refuses to make a due return on oath of his taxable property, he is liable by the law (of South Carolina) to double taxes, which are a lien on his estate.

1 Murph. 311; 1 Car. Law, 511; 2 Bay, 244.

Graves v. Hayden, 2 Litt. 65.

§ 17. A purchaser of land sold for non payment of taxes, holds *adversely* to the former owner, and may avail himself of twenty years possession: 2. This power to sell is entire, and the officer, who sells, must convey, though his office has expired before the conveyance is made; and 3 Litt. 37.

Barry v. Rhea, 1 Tenn. R. 345.

§ 18. It is sufficient for the purchaser of lands sold for taxes, to show such proceedings as the law requires to be of record; the rest are presumed to be regular. When land is sold for taxes, it must be proceeded against in the name of the real owner, or by such description as to make it known: 2. If it appear from the record that the land was not advertised as the law requires, the sale is void.

Bush v. Williams, C. C. A. S. Cooke, 361.

4 Cowen, 556.

§ 19. The real and personal estates of manufacturing companies are taxable, by the act of April 23, 1823, and repeals the act exempting them, &c.

§ 20. By an act passed in Massachusetts, Feb. 1829, no estate is exempted.

CHAPTER LXXIII.

NEGLIGENCE.

§ 7 *con.* If a wharfinger be not directed to store rice, he is not liable for the loss of it on his wharf after weighed, for the wharfage paid is not a consideration for the safe keeping of it. 1 M'Cord, 334.

§ 13. Decided a citizen is not liable to a penalty for *non appearance* at a company training, &c., until six months after he is notified of his first enrolment in the militia. 2 Pick. R. Haynes *v.* Jenks, pp. 172–183. Art. 2. *Con.*

Charles Jones Hall was enrolled in the militia by the name of Charles Hall. Held, not duly enrolled. 3 Pick. 262–264, Commonwealth *v.* Hall. 1 Pick. 386–464.

A person subject to militia duty, living within the limits of one brigade, cannot lawfully enlist in a volunteer company in another brigade. 4 Mass. R. 556; 11 do. 239; 16 do. 194; 2 Cong. 1 Sess. ch. 33. Massachusetts statute 1809, ch. 108. 3 Pick. 264–267; Webber's case.

3 Pick. 386, 387; Smith's case, Held, if a private in a militia company be excused for a time on a surgeon's certificate, from military duty, on account of bodily infirmity, he is not excused meeting for the choice of officers.

3 Pick. 390–394, Stacy *v.* Lyon; statute 1809, ch. 108, s. 4, exempting schoolmasters from military duty, extends to masters of private schools.

By statute 1825, ch, 153, it was intended when any one is enrolled in a standing company in the militia and notified thereof, he must show by the certificate, the act required that he is not liable to such enrolment, &c. Something more is required than mere enlistment in the voluntary company, that is, that he actually does duty therein, when required, and keeps himself armed, equipped, and uniformed, as a member thereof. 3 Pick. 506–508, Thayer *v.* Stacy.

1 Greenl. 408, 409. Held, excuses for non appearance at military inspection, must be offered to the commanding officer of the company within eight days after the inspection, unless the party be prevented from offering such excuses by severe sickness; Maine statute, ch. 164, s. 44; justice's judgment reversed: but 2 Greenl. 181–185, this does not apply to one, who, though notified in the prescribed manner, yet had no *actual* notice to appear. A captain imprisoned for debt, may issue orders for a company training. Cutter *v.* Tole.

In an action for the penalty under the militia act, the declaration must lay the offence as committed 'against the form of the statute in that case made and provided.' 2 Greenl. 348, Heald in error, *v.* Weston.

2 Greenl. 349–351; Pitts in error, *v.* Weston: in such action for neglect of military duty, it is sufficient for the deft. at

III. Ch. 73. Art. 2. Con.

the trial, to show that by reason of *permanent* bodily disability he was not liable to be enrolled as a soldier. He need not produce the surgeon's certificate, nor offer his excuse within the eight days. These regulations apply only to cases of *temporary* disability.

4 Pick. 123–125.

One who has served seven years in a volunteer company of militia, is *ipso facto* discharged; and unless he reenlists, is liable to be enrolled in a standing company.

10 Wheat. 406–410; how one entitled to a prize in a lottery must sue: 12 id. 40–63, Clark's case: 5 Pick. 189–239, cases.

Bush v. Brainard, 1 Cowen, 78-80.

§ 17. *Case for negligence.* Though the deft. be negligent, yet he is not liable to the plt. if he suffers loss by his own fault: as where A left syrup in the woods not inclosed, and exposed to cattle running at large, and B's cow did drink of it so that she died; held, A was not liable, because B had no right to permit his cow to go at large there. Otherwise, had the cow been there by A's permission, or lawfully there. Savage, C. J. said, 'in all cases where damages are sustained by the plt., in consequence of the use the deft. makes of his own property, it is necessary to inquire, not only whether the deft. has been guilty of culpable negligence on his part, but whether the plt. is free from a similar charge: see ch. 69, a. 2, s. 14; ch. 72, a. 1, s. 15; ch. 73, a. 2. s. 10; several other cases; 1 Cowen, 78–80.

Newton v. Pope in error, 1 Cowen, 109, 110.

§ 18. Pope hired Newton to drive a load with Pope's horses, to Connecticut. In the journey Newton so misused one of the horses that he was nearly ruined. Held, he was not liable, because the horse was not injured through Newton's *unskilfulness, negligence, or wilful misconduct*; was no evidence of either.

4 Cowen, 55, 56.

The rule allowing the plt. to try only one of several causes, where the question and the evidence is the same in all, pay no costs for not trying the others, and is confined to *property*, and extends not to *tools*, as to which, *damages must be assessed by a jury.*

Ann McAllister by her next friend, v. Hammond, 6 Cowen 342–346.

§ 20. Case for driving a horse and gig so negligently and unskilfully, &c., as to run against the plt., knock her down, and injure her, &c.; plea not guilty. Plt., a child not two years old, in a public street in New York. Verdict for the plt. $700. Question left, if the action should have been trespass. Judgment for the plt. Held, where an injury done to another by *negligence*, is both *direct* or *immediate* and *consequential*, (as in this case) the party injured may elect case or trespass: cited Blin v. Campbell, 14 Johns. 432; Percival v. Hickey; 18 id. 257–283; 5 Bos. & P. note; 1 Com. D. Day's ed. 234; 3 Campb. 188; 3 Wils. 336.

§ 21. Held, in Georgia, a judge is not liable for his neglecting to appear in the militia, and that he, as all judicial officers are, is exempted on the principles of the common law. The State *v.* Fort. III. Ch. 73, *Art.* 2. *Con.*

CHAPTER LXXIV.

NUISANCES.

§ 2 *con.* A landing place is not a way, and a town has no power to discontinue it, as it has a way: 2 Pick. R. 44–47, Commonwealth *v.* Tucker: and the selectmen have no power to lay out a landing place. Art. 5. *Con.* 1 Greenl. 111.

§ 15. It has been said this rule of twenty years is analogous to ejectment, that cannot be supported but on a right of entry, and that on 21 Jam. 1, which enacts that no person shall enter into lands but within 20 years after title accrued, &c.; but this is *statute* law, limiting positively, the right of entry, and does not apply where there is no such law. And though one may not enter after 20 years, yet he can bring his writ of entry and recover, if he prove seisin within 30 years, and his writ of right, if within 40, 50, or 60 years, as the acts of limitations may be. Art. 10. *Con.*

§ 16. 2 Brod. & Bing. 667, Chief Justice Dallas, says 'when lapse of time is said to afford such a presumption (20 years) the inference also is drawn from accompanying facts;' *and these must be left to the jury to presume*, &c.; this direction of his could not be disputed; and Burroughs, J. said 'every case of this kind depends on its own circumstances.' See Campbell *v.* Wilson, ch. 79, a. 3, s. 16; 3 East. 294–303. Where the presumption is repelled on facts, the jury could believe the 20 years was claimed only on the *leave* or *favor* of the other party, and not *adversely as a right*.

§ 17. It is the acquiescence of the party who complains of injury a long time, which affords the presumption of a grant. The court limited the presumption to 15 years, as so is the act of limitations of Connecticut. 1 Conn. R. 318—332. 2 Conn. R. 584, Ingraham *v.* Hutchinson.

Swift, C. J. stated the true principle of the common law, and the exceptions as in Brown *v.* Best, 1 Wils. 174; Beasly *v.* Shaw, 6 East. 208; does not admit, Perkins *v.* Dow, 1 Root, 535; nor Howard *v.* Mason, 537, the cases of irrigation, and says Howard *v.* Mason is overruled by the case of Sherwood *v.* Burr & al, 4 Day, 244, cited ch. 109, a. 4, s. 20, to another purpose.

Gould, J. dissented, and gave his reasons, in eight pages, and therein cited many cases, generally above stated; among

III. Ch. 74. *Art.* 10. *Con.*

others Weston *v.* Alden, as good law: also, Holcraft *v.* Hall, and laid stress on the deft's. encroachment commencing *in wrong*, so no leave, favor, or indulgence; Daniel *v.* North, 11 East. 372, Dugal *v.* Wilson, 373. It is in each for the jury to presume, as stated ch. 71, a. 2, s. 12.

Nor is the public limited to 20 years, but may suppress nuisances of longer standing, 7 East. 195—200, Weld *v.* Hornby; 2 Barn. & Ald. R. 662, Vooght *v.* Winch. Nor is the public right lost by non-user for 20 years, in public rivers, &c. the same.

Cooper v. Barber, 3 Taunt. 99.

§ 18. Time is not counted where there is no injury. As if A, 50 years ago, began to flow B's land when in a wild condition, and the flowing was no injury at all, A has ever continued to flow. Ten years ago, B cleared his land and built a house on it, and made his cellar under it; since so building, the flowing has often caused water in his cellar, and great damages; all the time *before* the 10 years is not to be reckoned. The principle of this case often exists, as where A passes over B's *waste* lands many years; then B clears it, ploughs and sows it. If it be said B may sue A for passing over his land when *waste*, and recover a mill damage, the answer is *de minimis non curat*. There are other answers, one the law presumes such harmless passing is permitted by B, till it ceases to be harmless. On this principle men are never sued, who go a hunting or gunning, over the lands of others, where they do no hurt. In this and other ways, the passing, easement or usage, may be *explained*, as by leave, favor, indulgence, mistake, &c. 2 Saund. by Wms. 175—175 e; 3 East. 294—303, and cases therein cited.

§ 19. In New York, the chancellor required 25 *years adverse* possession, to give a title whereon to order a conveyance, as a specific performance. 1 Hop. Ch. R. 436—450, Seymour *v.* De Lancey & al.

3 Greenl. 120—126, (see ch. 69, a. 2, s. 2.)

§ 20. So no grant is presumed where A claims an easement in B's land, as to flow it, &c. if A has a right so to do, by deed, or by statute, as by Mass. statutes 1714, 1796, &c. giving one a right to flow another's land by a mill dam, paying damages. In such cases there is no need to presume a grant. The user is accounted for in another way.

4 Pick. 245—246.

§ 21. *Adverse* possession of *land* for 20 years, does not, of itself, raise a presumption of a grant to the tenant; but circumstances may be such as to enable a jury to presume a grant of the *land*.

If an ancient window has been completely shut up with brick or mortar, above 20 *years*, it loses its privilege; and if a building, after having been used for 20 *years* as a malt house,

is converted into a dwelling house, it is entitled, in its new state, only to the same degree of light it possessed in its former state. So where an old house is pulled down, and a new one built, the light in the new house must be in the same place, of the same dimensions, and not more in number than in the old house. Eden, 165.

§ 22. Chancery has concurrent jurisdiction with courts of law, in a case of private nuisance, by diverting or obstructing an ancient water-course, and may issue an injunction to prevent the interruption. In this case many points are decided, and more stated, as to *adverse* possessions, from all of which the following principles may be extracted: 1. I own a tract of land in fee; A, to have *adverse* possession, must enter on it in a manner *hostile* to my title, denying it, and independent and exclusive of it, claiming *entire* title. His possession must be *adverse in its inception*, and *ab initio*; and the title he claims must be *entire*, for his possession is not *adverse* if he admits any higher title. If he so enter and claim, and so continue to possess and claim 20 years, my entry is barred by statute law: 2. If I contract to convey the land to A, and he enters under the contract, his possession is not adverse, and if continued 20 years, bars not my entry: 3. Nor can he convert this into adverse possession, by changing his mind, but to do it he must do some act, that manifests his intention to convert his possession, *under me*, into one *adverse* to me, to the people of the county. This he may do by taking, *openly*, a deed of the land from B, conveying an entire title thereby in action, at least, denying my title, as he claims to possess, solely, under B's deed, and by this act so manifest his intention to hold under B's deed, and no longer under my contract. A's *adverse* possession commences from the time he takes B's deed, and if A continues his possession so claiming under B's deed 20 years, my entry is barred by the statute, by positive statute law: 4. So where A and B are tenants in common, and A alone possesses and occupies the land, the law intends he holds according to their titles under both, till A makes the contrary appear by some *overt* act or acts of his, proving he holds *adversely* to B's title. This he may do by forbidding B to enter, by refusing him any part of the profits, or by selling a part in fee to be held in severalty, &c.: 5. This bar by statute is one thing, presuming a deed, after 20 years possession, is quite another. This presumption is founded on all the circumstances of the case, and ever is to be made by the jury; in making which the *acquiescence* of him against whom to be made, is the most essential circumstance. However, possibly, there may be a case in which the circumstances are so clear

Gardner v. the Village of Newburgh, 2 Johns. Ch. R. 162; Bergen v. Van Bergen, id. 272; Van Bergen v. Bergen, 3 Johns. Ch. R. 282; 2 Johns. Ch. R. 468, Jackson v. Johnson; same v. Brainard. 5 Cowen's R. 74—106.

III. Ch. 74. Art. 10. Con. and strong in support of the presumption, that the court, in its discretion, may think it unnecessary to refer the case to a jury; even this may be doubted, if the party to be bound by the presumption, claims a jury trial: 6. *Acquiescence* of the party to be barred, may have been so complete and so many years as in itself to prove *adverse* possession in another, as in the case above stated, B's acquiescence may have been uninterrupted above 60 years.

CHAPTER LXXV.

OFFICERS, AND OFFICES.

Art. 1. Con. § 8. If two offices be incompatible, a person relinquishes one when elected to the other and accepts; though the election be void, and he is officer in the new office, but *de facto*. 5 Barn. & Cres. 888.

Wattles and others v. Marsh, sheriff, 5 Cowen, 176-181. § 9. The officer is bound to execute a *habeas corpus ad respondendum*, if issued by competent authority, and nothing appears on the face of it, to show it is void, and numerous cases cited by counsel; by the court, Hassam v. Griffin, 18 John. 48; 5 id. 357; 3 Esp. R. 383; 3 Burr, 1340; 4 East. 587; 13 John. 444; 19 id. 39; 1 Cowen, 309. Mostly to show the judge had power to issue the writ.

Art. 2. Con. Ely v. Thompson, 3 Marsh, 76. § 7 *con.* This exemption of a judge, applies to cases within his jurisdiction; but this rule does not hold, if he exercises authority where he has none, or assumes jurisdiction without any power; but the mere circumstance of a judge having been engaged in a cause as counsel for one of the parties, does not disqualify him for sitting in the cause. Owings v. Gelson, 2 Marsh, 517.

§ 12. Where a deputy sheriff attached a vessel, and the sheriff was sued, the deputy was admitted as a witness, being released by the sheriff. 16 Mass. R. 181.

Art. 3. Con. 1 Pick. R. 62-71, Campbell v. Phelps. § 1 *con.* This was trespass against the sheriff *de bonis asportatis*. Held, the action did not lie, as there had been a judgment in a like action against his deputy, and his body taken in execution for the same cause, though the judgment was not satisfied.

2 N. H. Rep. 184, Morse & al. v. Betton.—18 Johns. R. 133. *How liable after out of office.* Held, the sheriff is liable for goods attached by his deputy, though he and his deputy be both out of office when the goods are demanded. It is his duty to pay to the plt. without request, monies collected on execution, and for neglect to do so, he may be attached; not sufficient he

15 do. 456. returns, he has the money subject to the plt's. order. If he neglect to return an execution, the plt. may have case or an

attachment against him. It is his duty to return writs, though not requested to do it. id. The people *v.* Spraker, 18 Johns. R. 390. The plt. to have the benefit of the sheriff's bond, must first get a judgment against him in *an action*. Not enough he has been attached. 20 Johns. R. 297—300.

§ 4. If a deputy sheriff have a writ of attachment, and receive money of the debtor, and make return that he considers it as personal property attached, and embezzles the money, and the debtor is compelled to pay the debt, the sheriff is liable to him for the amount of the money. Official act means any act done under or by virtue of an office. The money was 'pretended to be attached, and the deputy acted under colour of his office;' interest allowed from the time of payment. If a writ be delivered to an officer with directions to attach property if practicable, otherwise to make no service; held, it is his duty to make diligent search for property, and if none is found, to make a seasonable return of that fact, on the writ, in his official capacity, as a reason for omitting to serve the writ. 2. If a deputy sheriff have a writ for service, and receive the money of the debtor, and make no service of the writ, the sheriff is liable under a charge for neglecting to serve and return the writ, to the amount of the money and interest, and without previous demand on the officer.

1 Pick. R. 271–275, Knowlton *v.* Bartlett

3 Greenl. 372–377, Green, in error *v.* Lowell.

§ 4 *con.* If a justice of the peace act in a case in which he has no jurisdiction whatever, his acts are *coram non judice*, and void; but if he has jurisdiction and err in exercising it, his acts are only voidable. As where he, having jurisdiction, gave judgment for above $5 costs, besides the damages, (the statute limiting costs to $5;) held, his judgment was only voidable, and the justice not liable to an action of trespass and false imprisonment at the deft's. suit, who was imprisoned on such judgment. Butler *v.* Potter, 17 Johns. R. 145. He may try a cause, and especially with a jury, though *half uncle* to the plt's. wife. Do. 133; 19 Johns. R. 172–375.

A court of common law has concurrent jurisdiction with the *instance* Court of Admiralty, of a *marine tort*.

18 Johns. R. 257.

If a court, not having jurisdiction, take cognizance of a cause without gaining jurisdiction of the deft's. person, by having him before it, as the law requires, its proceedings are void: 2. If of a limited jurisdiction, and the magistrate attempts to enforce a proceeding, founded on any judgment, sentence, or conviction, he is a trespasser: 3. And the party affected, even in a collateral action, when the conviction is set up in defence, may show the want of jurisdiction of the person convicted. 4. Whenever a new power is given to a justice of the peace, he must proceed in the mode prescribed in the statute.

Bigelow *v.* Stearns, 19 Johns. R. 39.

III. Ch. 75. *Art.* 4. *Con.*

1 Tennessee R. 1.

The jurisdiction of the superior court can be taken away only by express negative words; and where the circuit court has original jurisdiction in a cause transferred from the county court, without trial first had in it, and the cause is tried in the circuit court, judgment will not be arrested; otherwise if the circuit court had only appellate jurisdiction. Elkins *v.* Sams, 3 Hayw. 44; 4 do 54. A State court has jurisdiction to interfere in the case of a fine levied under a law of the U. States, for delinquency as a militiaman, where the fine was assessed by a State court martial.

Durham *v.* the U. States.

1 Hayw. 454. Sheppard *v.* Briggs, 2 Hawks, 369.

A plea in abatement, the plt's demand is not of the value of £100, is not the proper mode of taking advantage of the want of jurisdiction. In debt on a bond for less than $100, since the statute of 1820, advantage of a want of jurisdiction, can be taken by plea in abatement only.

Art. 7. *Con.*

17 Mass. R. 244—247.

§ 3 *con.* Trespass is the proper action against the sheriff for an injury done by his deputy to the person or property of another, where trespass is the proper action. Case does not lie; this injury was, the deputy took the plt's. goods and sold them on an execution against the Chester Glass Company; case was brought; the action must be the same against the sheriff or his deputy; the party injured has his election to sue either.

3 Greenl. 418—420.

Art. 8. *Con.*

1 Pick. R. 59—61.

§ 7. But if judgment for the deft. the officer may recover the expense of the plt. on his implied promise to indemnify him.

What is possession? An officer having a writ, &c. goes to the debtor's store in his absence; but his clerk locks the store containing the goods, and delivers the key to the officer; this is a good attachment and possession of the goods, and is so against another officer, who, afterwards, by the debtor's contrivance attached and removed the same goods. 16 Mass. R. 420, Denny *v.* Warren, page 465—470; Gordon *v.* Jenny, the same principle. One deputy may have replevin against another of the same sheriff, on his prior attachment of the goods. Such deputies act independent of each other, and the one who first attaches, acquires a special property, which entitles him to an action against any person who interferes with his possession.

A constable can serve a writ where the sheriff or his deputy is a party, if the damages sued for or recovered, do not exceed $70. He may attach property in his own town, though the debtor be not an inhabitant or resident in it. An officer may attach a boat, cable, and anchor, appurtenant to a vessel at a wharf, if not necessary to her safety.

17 Mass. R. 405—409, Briggs *v.* Strange.

2 Greenl. 221—228, Twombly & al. Hunnewell, sheriff, &c.

§ 10 *con.* *Expenses of keeping things attached.* See s. 8. Where the original debtor's goods are attached, and he charges the officer with having lost or wasted a part of them, he may excuse himself by shewing he has applied the amount to the

plt's. use, by therewith paying the expenses of keeping the goods: 2. These expenses are a *lien* on the goods; and it is not affected by the court's allowing a sum for that purpose, in taxing costs for the original plt. in the action; was case against the sheriff for the neglect of one of his deputies. III. Ch. 75. *Art.* 8. *Con.*

And if a deputy sheriff release the goods attached before the thirty days are expired, he is liable to an action on his bond to the sheriff. 16 Mass. R. 5—9, Cooper v. Mowry.

§ 12 *con.* An equity of redemption on personal property is not attachable, and the officer must have possession of personal property, or the control of it or he fails; but every article attached, need not be touched or removed, if all be inventoried and left in the custody of his agent. 2 N. H. Rep. 13. p. 66. 317.

A valid attachment subsisting, made by one officer, prevents a *different* officer's attaching the same property: 2. When the articles attached, are delivered to a third person, and his receipt is taken for their safe keeping, his power is subordinate, and he cannot sell or loan them. 1 N. H. Rep. 66.

The plt. attached goods and carried them to Rhode Island, and delivered them to a keeper, and took his receipt; and he put them into the deft's. hands to keep. Held, the plt. could have trespass and recover the value of the goods against the said strangers. The plt. retained the special property, and a constructive possession; his keeper was his servant, bound to deliver them to him; the sheep, &c. being carried into Rhode Island made no difference. 4 Pick. 395–398, Bayley *v.* White. Where an officer attaches goods but does not retain possession of them, notice of his attachment will not preserve his lien, against the attachment of another officer. p. 135—142. 1 Pick. R. 282-286, Brownell, a deputy sher. v. Manchester & al. N. H. Rep. 87; 2 id. 87.

§ 32 *con.* No overt act, by the sheriff, is necessary to constitute an attachment of property previously in his custody. 16 Mass. R. 181–188, Turner *v.* Austin. Sheriff was deft.; property in the custody of his *deputy*, he was admitted as a witness, being released by the deft.

§ 40. *Officer liable to nominal damages, though he neglect to keep his attachment* made by him, that is, where thereby the creditor sustains no loss, the attachment being of no value. 16 Mass. R. 294—299, Rich *v.* Bell.

§ 5. Where a deputy sheriff attaches goods, he has such a property in them, that on his death his executor may maintain trover against *a stranger* who converts them. Against *a stranger* possession is sufficient on general principles. See Trover and Possession. Art. 10. *Con.* Ch. 112, s. 7, s. 20.

§ 2 *con.* So a writ of error from the supreme court of the United States, to reverse a judgment of the supreme judicial court of Massachusetts, before execution, dissolves an attachment made at the commencement of the action, when a cause Art. 11. *Con.*

III. Ch. 75. Art. 12. Con.

is so removed. The act of first Congress, 1 ses. ch. 19, s. 22, (should be ch. 20.)

§ 18 *con.* It seems the principles in this section are not supported by a decision in New Hampshire. N. H. Rep. 289—295, Poole *v.* Symonds. This in New Hampshire was very much examined and numerous cases cited.

Walker *v.* Fuxcraft, adm. 2 Greenl. 270–274.

§ 33. Trespass for taking a horse from the plt., a deputy of the deft. The plt. had properly attached the horse and delivered him to A to keep and return, taking his receipt, &c. and made due return of his writ and his doings thereon. In this state of the case another deputy of the deft. having an execution against the same debtor, seized the horse in A's hands, and sold him, &c. though forbidden to do so by A. Plt. was nonsuited below and a new trial was granted. Held, 1. A deputy sheriff in Maine acquires a special property to himself in the goods he attaches, which the sheriff cannot devest or control. He is very unlike the sheriff's servant or deputy in England. Were cited many Massachusetts cases.

Art. 20. Con.

§ 11. *As to an officer, a member of a corporation,* serving *a writ for or against it,* this distinction has been made: as to *quasi* corporations, as towns, parishes, &c. which have no corporate funds, each inhabitant, or corporator, is a party to the suit, as his private property is liable on the execution; but in proper corporations as banking companies, &c. it is otherwise, as no property is liable to be taken, but the corporate. Hence, in an action against a banking company in which a deputy sheriff was a stockholder, held, the writ could be served by him within the Maine act, ch. 93. Also held, the deputy was not a *party* to the suit. But decided, Brewer *v.* New Gloucester, 14 Mass. R. 216, that *each inhabitant of a town* is a *party* when it sues or is sued. Court cited 7 Mass. R. 169; 2 D. & E. 667; 7 Mass. R. 188; Cowp. 86; 5 Mass. R. 520. *Quære,* as to the real difference: ultimately the member of the town or bank is equally liable to pay his part of the judgment against it. A town owes a debt of $1000 to A: he gets judgment for it: ultimately B, an inhabitant, pays his part of it, and is thereby discharged of his part of the debt. So a bank owes a debt of $1000 to A: he gets judgment for it, and ultimately B, a corporator, pays his part of it and is discharged thereby of his part of the debt. In point of interest it comes to the same thing in the end. As to the inconvenience stated, it may deserve much attention—but even this, is it not a subject of legislation?

Adams *v.* Wiscasset Bank, 1 Greenl. 361–365, plea in abatement.

Governor *v.* Jones, 2 Hawks, 359.

§ 12. Sheriff's bond, sureties, &c. The sheriff is not liable in debt on his official bond for not taking bail, when he executes a *capias* in civil cases; but must be proceeded

against as bail by *scire facias*. If a person elected sheriff voluntary gives a bond with surety in a penalty greater than the law requires, and enters on the duties of his office, he and his sureties will be liable for a breach, though not by summary process: 2. In a suit on such bond it is not necessary to show that the governor has sustained damages. A sheriff is not liable for misfeasances in offices, by levying on lands when the deft. in the execution had sufficient personal property, unless shown he knew it was the deft's. property; or unless pointed out to him as such an indemnity offered to sell it. III. Ch. 75. *Art.* 20. *Con.* Governor *v.* Matlock, 2 Hawks, 366. Mc Coy *v.* Beard, 2 Hawks, 377.

The sureties to a sheriff's bond for the year 1821 are not liable for any taxes received by their principal, under the lists furnished by him in 1820, but the sureties for 1820 are liable. Fith *v.* Hawkins, 2 Hawks, 394.

§ 13. He must be pursued to insolvency, and *nulla bona* returned, before his sureties can be sued. 1 Mc Cord, 184.

§ 14. In an action on the sheriff's bond, where the plt. declares for the thirty per cent. damages given by the statute for failing to return an execution for one month or more, if the deft. demur generally, the plt. may recover such damages as he has sustained in fact. Judgment against him for failing to return an execution, he may avoid it in equity by showing that as between the plt. and the deft. in the execution, it ought not to have been collected. Commonwealth *v.* Bradley, 1 Litt. 48. Harrison *v.* Harrison, 1 Litt. 144.

§ 15. An allegation he has levied a *fi. fa.* on property of one of the defts. sufficient to satisfy the execution; that he advertised the property for sale, and that it was not sold, for want of bidders, is not a sufficient averment of a breach of his official bond. Commonwealth *v.* Fuqua, 3 Litt. 44.

§ 16. He is liable in trespass if his deputy, on an execution against A, takes the property of B. So for taking insufficient sureties on a bond for prison bounds, though sufficient when taken. So for an escape, though the prisoner be destitute, and the plt. refuse to pay for his support, or to give security for it. 2 M'Cord, 410. 1 Const. Rep. 140 and 212.

CHAPTER LXXVI.

PROPERTY SPECIAL.

§ 4. 4 Pick. 268–275, Ingraham *v.* Wilkinson & al., the same principle, where decided that the proprietors of the banks of a river not navigable, own respectively the soil to the middle of the river: 2. An island in it one side of the dividing line, belongs to the owner of the bank of that side; if in the middle of the river, it belongs in severalty to the owners of the banks on each side; and the dividing line will run in the Art. 1. *Con.*

III. Ch. 76. same manner as if there were no island in the river. This is
Art. 1. American, English, French, and Roman law.
Con.

§ 5. 3 Barn. & Cres. 91—108, The King *v.* Lord Yarborough, held, alluvion made gradually by the sea throwing up sand, &c. belongs to the owner of the adjoining land and not to the public.

5 Pick. 177, Stevens *v.* Briggs.

§ 6. The plt. found boards, and a workman agreed to make him a desk, while making it was attached as his property, held it was the plt's. property.

Art. 2. *Con.*

§ 12. *Assumpsit* to recover about $3,000, with two per cent. interest. Held, 1. The holder of bank bills is entitled

3 Mason, 1, Suffolk Bank *v.* Lincoln Bank.

to be paid in specie only on demand, within the usual banking hours of the day of demand, &c., and if in foreign coins, by weight: 2. A bank is bound to keep money counted, or weighed, or to employ persons so as to pay all demands made in said hours: 3. The plts. were not bound to receive their own bills in payment, of course not bound to receive the bills of other banks or a draft in payment. Verdict for the plts. including the two per cent. a month. Like case, 5 Cowen, 161.

3 Mason, 308-323, Wood and other *v.* Dumer and others.

§ 14 *con.* Bill in equity brought by several holders of the bank bills of the Hallowell and Augusta Bank, against Dumer and others, part of the stockholders. Before the charter expired, the stockholders divided three fourths of the stock among themselves, and did not leave enough to pay their bills in circulation. Held, 1. The whole capital stock was in equity a trust fund for paying the bills of the bank, and this equity would follow it into the hands of the stockholders: 2. The stockholders held liable to pay their parts of said bills, in proportion as they held stock in the bank, that is, if one held a fiftieth part of the whole capital stock, for instance, he paid a fiftieth part of the bills. See ch. 221, s. 47.

16 Mass. R. 106-107.

And if a turnpike road be out of repair, the corporation is liable, though in such a state as it was when approved.

3 Mason, 505.

A cashier of a bank has *prima facie* power to endorse negotiable securities held by it.

19 Johns. R. 322.

If a bank refuse to pay specie, and its bills cease to circulate, this is not sufficient evidence of its insolvency, to prevent a *bona fide* holder of them to set them off in an action against him by such bank.

§ 19. 2 Pick. R. 41-44, Roxbury, town of, *v.* Worcester Turn. Corp., held, if a town keep in repair part of a turnpike road laid over an old county or town road, *assumpsit* does not lie for the expense; there is no implied promise to pay.

An action lies against the selectmen of a town for laying out a highway round a turnpike gate, with a view to evade the payment of toll. 2 N. H. Rep. 199, the Third New Hampshire Turn. *v.* Champney & al.

§ 20. This act provided that if any person, with his team, cattle, &c. turned out of the turnpike road and passed over adjoining ground, and then returned into the turnpike road, with intention to defraud the company by the avoiding the payment of toll, he should forfeit $5, &c. Held, that the person who so turned off travelling on an old public highway, made no difference; for the only question was, did he turn off *bona fide*, or merely to avoid paying toll? 2. If a person so turn off about half a mile from the gate on ground adjacent to it, he is within the meaning of the act. What is or is not a pleasure carriage. III. Ch. 76. *Art.* 2. *Con.* Carrier v. Schoharie Turn. Co. 18 Johns. R. 56. 18 do. 129.— 19 do. 442.

§ 21. Where the statute directs a toll gate to be placed near a State line, one placed two miles and three quarters from it, is not near it, and so illegal, and toll received at it may be recovered back: 2. It seems if power be given to a turnpike company to erect toll gates within certain limits, and they exercise their discretion and erect them, their power is at an end and they cannot remove them but for very special reasons: 3. Though such company have a right to repair a road so as to prevent the effects of rains and freshets, yet in exercising this right they must take care not to injure the owners of the adjoining lands: 4. They have no right to turn water, which washes the road, upon the lands of private persons, and if they be injured for want of care, or by negligence in this respect, any such person may have an action on the case for his damages. These are common principles and a part of the maxim *sic utere tuo*, &c. and Griffin v. House, 18 Johns. R. 397.

§ 22. Company may have trespass at common law or debt, for the statute penalty for destroying their gates, &c.: can pledge tolls, but remain in possession of their gates. 10 Johns. R. 389. What is the common business of a farm. 17 do. 33. Other turnpike cases. 15 do. 510; 16 do. 8, 78.

§ 9. Libel on bottomry bond, pledging the *ship*, *freight*, and *cargo* in Norway, bound to Boston. On a voyage from Russia, the master found himself obliged to put into Christiansand, in Norway, to repair, and not having money of his own, or of his owners, and not able to sell a part of his cargo without great loss, borrowed of Wilson, & Co. in London, £9205, 2*s*. 10*d*. sterling, including the fourteen per cent. premium, the libellants on bottomry, common form, to be paid in three days after the vessel should arrive in Boston; she arrived there, &c. Held, 1. The suit being *in rem*, the insurers are not a party, not having accepted the abandonment: 2. In case of necessary repairs, the master may sell part of the cargo or hypothecate it: 3. Not bound to apply the shipper's money: 4. He has a large discretion: 5. If he has sufficient money Art. 3. *Con.* 3 Mason, 255–268, Ship Packet, Barker master.

III. Ch. 76. Art. 3. Con.

of his owners, he cannot borrow on bottomry: 6. The sum lent and bottomry premium, is viewed as principal; and common interest thereon is allowed for delay of payment after due: 7. The master has a lien on the *frieght* for all advances made abroad for the ship's use: 8. If the property of a shipper is taken and sold for the ship's necessities, and to enable her to perform the voyage, he has a right to contribution over against the other shippers, and his remedy is not confined to the ship owner: 9. A bottomry bond may be good in part and bad in part: 10. The court may moderate the premium if inflamed by extortion. 3 Mason, 342–348; other cases.

Art. 7. Con.

§ 7 *con. Derelict* property. British frigate the Hussar, sunk in the revolutionary war. The plt. claimed the possession, on the ground he had occupied her when *derelict*, and prayed an injunction against the defts., who hindered his operation in attempting to raise her. Defts., by their answer, claimed to be the true occupants. The master's injunction dissolved; the remedy being at law, &c. No injunction *ex parte* to transfer possession from one to another.

1 Hop. Ch. R. 135—143, Deklyn & al. v. Davis & al.

4 Pick. 249—250.

§ 14 *con.* If A takes up an estray to keep it for the owner, but neglects to take the steps of the law, he is not liable in trover, unless he uses the beast or refuses to deliver it on demand. See ch. 186, a. 11, s. 19.

§ 30. In a similar case, March Term, 1829, the District Court of the United States, for the dictrict of Massachusetts, decided the owner's part of the proceeds, after remaining in court 22 years, and not claimed by him, belonged to the United States, and not to the salvors, nor to Massachusetts. See American Jurist and Law Magazine, vol. 2, p. 7. This case was fully argued for the salvors and the State by Pickering, and for the United States by Dunlap, United States attorney; first case of the kind. Numerous authors were cited, some Asiatic and American, but mostly European; all various and confused; no appeal.

Art. 8. Con.

2 Barn & Cres. 76—80.

§ 9. *How fixtures may be affected by a sale.* The owner of a freehold house, in which were various *fixtures*, sold it at auction; nothing was said about them. A conveyance of the house was executed and possession was given to the purchaser, the fixtures remaining in the house. Held, they passed by the conveyance of the freehold, and even if they did not, the vendor, after giving the possession, could not maintain trover for them. A few articles, not fixtures, were also left in the house, the demand described them together with the other articles, as *fixtures demanded*. Held, that upon this evidence, the plt. could not recover them in this action. The things demanded, were stoves, grates, kitchen ranges, closets, shelves,

brewing-coppers, cooling-coppers, wash-tubs, locks, bolts, blinds, &c. Colegrave *v.* Santos. III. Ch. 76. *Art.* 8.

§ 31 *con.* 'In case of a lease, a tenant may remove buildings erected on the demised premises in such a manner that they may be removed without injury to the soil. But if one erect buildings on the land of another voluntarily, and without any contract, he may not remove them.' A feme covert can make no contract. *Con.* 16 Mass. 449.

A padlock and boards loose in a corn barn, are not fixtures, and a tenant for life, years, and at will, may, at the expiration of his term, remove them from the freehold, and all such improvements as were placed there by him, the removal of which will not injure the premises. 4 Pick 310—311, Whiting *v.* Brastow.

A shop placed on my land, by my permission, by A, may be taken on execution as his *personal* estate, and if sold to B, he may remove it, and therefor enter on my land, and it is enough B prove the officer, who had the execution, was one *de facto*. And it is not material he is one of the defts. Cited 17 Mass. R. 282; 1 Pick. 43, Ellis *v.* Paige. 5 Pick. 488—490, Doty *v.* Gorham & al.

§ 40. In New York further—It seems that machinery for spinning flax and tow, and carding machinery attached to the building by an upright board, resting on the frames, and fastened at the ceiling, and by cleats nailed to the floor round the feet of the frames, but the frames or machines themselves not otherwise fastened to the building, are not *fixtures*, but personal chattels. So are a cider mill and press, erected by the tenant, from year to year, at his own expense, and for his own use, in making cider on the farm; and the tenant may remove them, at the expiration of his term; and if, after such expiration, he enters and removes them, though he may be liable to trespass on the land, yet they remain his property, id. Cresson *v.* Strout, 17 Johns. R. 116. Holmes *v.* Kemper, 20 Johns. R. 29.

§ 41. Held, that as between vendor and vendee of land, all *fixtures* pass to the vendee, though they were erected by the vendor for the purposes of trade or manufactures. 2. The rule is the same as between heir and executor: 3. Is otherwise as between the tenant and landlord or reversioner, and as between tenant for life, and the remainderman. Miller *v.* Plumb, 6 Cowen, 665—668, error.

§ 3. 12 Wheat. 568—570. The rule *partus sequitur ventrem*, is universally followed, unless there be something in the terms of the instrument, which disposes of the mother, separating the issue from her. As to slave's same rule, 20 Johns. R. 1. Art. 9. *Con.*

Animals *feræ naturæ*. Though a man may acquire property in them by occupancy, or by so wounding them as to have them in his power, yet if, after wounding the animal and continuing the pursuit of it till evening, he abandons the pursuit, he acquires no property in it, though his dogs continue the chase. Buster *v.* Newkirk, 20 Johns. R. 75.

III. Ch. 76. *Art.* 9. *Con.*

Ferguson *v.* Miller, 1 Cowen, 243—244.

§ 15. Wild bees in a tree belong to the owner of the soil where the tree stands: 2. Though another discover them and obtain license from the owner to take them, and mark the tree with the initials of his name; this does not make him owner of them, until he has taken actual possession of them: 3. If he omit to do this the said owner may give a like license to another, who may take the bees without being liable to the first finder: he had neither the ownership or possession: he could only become owner by taking possession.

Art. 10. *Con.*

2 N. H. Rep. 251-255, Sanborn *v.* the Town of Deerfield.

p. 202.

p. 352.

§ 8 *con. Selectmen—their general powers and duties.* Held, selectmen are general agents for towns, in respect to pecuniary matters, and, unless restrained by special acts, are warranted in paying any existing debts of the town requiring immediate payment; and if they or one of them do pay their or his money, he or they may recover of the town the amount so paid: 2. But they have no power to fill a vacancy in an office but by statute law: 3. Their right to sue in their own names in consequence of their making themselves liable to their town—their duties and powers on each of many subjects, as ways, schools, licensed houses, &c. see each subject.

§ 12. Statute of Maine, 1821, ch. 59, sec. 26, in like manner provides for towns, &c. and is, 'that the treasurer of the State, treasurers of counties, towns, parishes, and other corporations for the time being, may commence and prosecute, in their own names, any suit or suits at law, upon any bonds, notes, or other securities, which have been or may be given to them or their predecessors in said capacity.' Held, this remedy does not take away the right of the towns, &c. to sue as before; also that an attorney who held the town's money recovered by its treasurer, could not set off his *private* debt. He owed the attorney.

3 Greenl. 369-371, Inhab'ts. of Newcastle *v.* Bellard.

§ 28. Whenever they become the holder of a bill or note by their authorized agents, they are bound to use the same diligence in order to charge the endorser a private person is. 12 Wheat. 559—561, United States *v.* Barker, adm'x.

Art. 11. *Con.*

2 Pick. R. 538-540.

§ 6 *con.* If A be exempt paying toll passing on a turnpike road with his horses, team, or cattle, to or from his common labours on his farm, he is not excused paying toll when carting wood to his farm for burning bricks there made for sale.

4 Pick. 341—349, Williams *v.* Hingham and Quincy Bridge and Turnpike Corporation, case against it. Declaration special for defect in the railing of the bridge, whereby the plt. his wife, &c. and chaise, (his horse being frightened,) were precipitated into the river, &c. Held, 1. Statute 1804, ch. 125, s. 6, takes away the remedy at common law: 2. Only those liable to pay toll can have an action on that

statute for an injury so occasioned: 3. The declaration must state the plt. is so liable, or some facts whence it may be inferred he is so liable, and if wanted, the defect is not cured by the verdict: 4. Plt. allowed to amend, paying costs, and after verdict: that set aside and a new trial granted. This statute respects only turnpike corporations afterwards created. III. Ch. 76. *Art.* 11. *Con.*

The property of the owner of the fee is not devested by completing a canal over the land. The fee passes on the payment of the damages assessed. 1 Wendell's R. 470, Laverty v. Burr.,

§ 29. *Running the toll, &c.* Passing in a vehicle swiftly by a turnpike gate, and not stopping, when called after, to pay the toll, is a forcible passing. 3 Pick. 342–344.

Provision none pass a lake over which was a bridge within three miles of it without paying toll, how construed; when strictly so. 4 Mass. R. 145, Coolidge *v.* Williams; also do. 473. 2 Cowen, 419–421, Sprague v. Birdsall.

§ 35. *Assumpsit* as well as debt lies for toll: 2. A statute gave a corporation a right to demand and recover certain tolls on the passage of logs through a river, and to stop and detain such logs till the toll should be paid: held, the corporation might have an action for the toll, the right to detain being only a cumulative remedy. The words 'may be demanded and recovered' were in the act of incorporation.

§ 36. A person residing in a town where a turnpike gate is placed, who is exempted from toll when going 'on his common and ordinary business of family concerns within the said town,' is not by virtue of such exemption entitled to pass the gate free of toll when going into another town upon such concerns. 4 Pick. 388, Kent v. Newburyport Turnp. Corp.

§ 37. One acting as toll-gatherer is *prima facie* evidence he is so, in an action against him, and the *onus probandi* is on the plt. to prove he is not. 1 Cowen, 251–253.

CHAPTER LXXVII.

TROVER.

§ 1 *con.* The plt. must have property in the chattels and the actual possession, or the right to immediate possession. But lies not for gravel dug in land by A, having the right of possession, against B, having the actual adverse possession and claiming title to the land. id. Art. 2. *Con.* Mather v. Trinity Church, 3 Serg. & R. 509—515.

The deft. agreed for a valuable consideration to deliver to the plt. the first female colt a certain mare owned by the deft. might produce; this vested a property in the colt when produced, and entitled the plt. to an action of trover for the colt. 1 Murph. 389.

III. Ch. 77. *Art.* 5. *Con.*

§ 2. *con.* The plt. agreed to exchange with the deft. a black horse, warranted sound, for a bay mare and forty-six guineas, and five guineas more if the black horse suited: the horses were exchanged, but the deft. refused to pay the money, pretending the black horse was not sound. Held, the plt. might recover it on an *indebitatus* count for a horse sold, as nothing but the payment of money remained to be done.

3 Barn. & Cres. 420, 121.

Art. 8. *Con.*

§ 3. Further cases of trover, 2 N. H. Rep. 566.

§ 18. Condition of a promissory note. Deft. had left one with an attorney. A demand was made on the deft. of an order on the attorney for it, and the deft. refused to give the order, contrary to his duty. Held, this is sufficient evidence of a conversion: 2. Held, not necessary to give notice to the deft. to produce it. If shown he has it in his possession, or under his control, the action is notice: 3. Any wrong description of the note in a material part, in the plt's. declaration, as in the sum, date, &c. is fatal: 4. If the plt. cannot state the exact sum of the note, he may state it to be of great value, to wit, of the sum of ——.

Bissel v. Drake, 19 Johns. R. 66.--4 Pick. 466.

§ 19. The measure of damages in trover, to be recovered, is the value of the goods at the time of the conversion: 2. If a factor, for his own debt, pledge his principal's goods, it is a conversion: of a note what it is really worth. 1 Cowen, 240.

Kennedy v. Strong, 14 Johns. R. 128.

id.

§ 20. In trover for a negro woman, a slave, the value of a child born *pendente lite* cannot be recovered, but must be the subject of another action.

Teague v. Maxwell, 1 Nott & Mc Cord, 200.

§ 21. Trover. The plt., on execution, levied on the goods of Bull and took the receipt of him and Eager for them and left them on Bull's premises. By the receipt they promised to deliver them on demand. This was done on the day appointed for the sale: not sold, and B. & E. again received the goods on the former terms. Plt. appointed and advertised another day for the sale. In the mean time the goods were removed by J, who claimed them as the owner of them, *with the consent and in the presence of Eager.* They remained openly in the county accessible to the sheriff. He demanded them of the receiptors, who did not deliver them.

Lockwood, sheriff, v. Bull and Eager, 1 Cowen, 322-335.

Held, 1. This was a *conversion* in Eager but not in Bull: 2. Demand and refusal is *prima facie* evidence of conversion, but no conversion may be proved: 3. This action lies as well as *assumpsit* or case against a bailee, when a conversion can be proved: 4. In an action in form *in tort* one deft. may be found guilty and the other acquitted: 5. The sheriff's leaving property levied on with A, or in his control, is a sufficient consideration for his promise to redeliver it: 6. And valid, though the promise be by *parol:* 7. In such case the

sheriff has sufficient property in the goods levied on to support trover or trespass. The deputy who made the levy was the witness to prove the facts in part. III. Ch. 77. *Art.* 8. *Con.*

§ 22. On verdict and judgment for the plt. in trover in the common pleas, deft. brought error, and judgment affirmed. Deft. in error, (plt. below) has interest from the time of the judgment below and double costs, the execution being actually delayed by the writ of error; and 2. In trover the plt. may recover interest on the value of the goods from the time of the conversion. 4 Cowen, 53, 54.

§ 40. *What is a conversion by two persons or not.* Trover for certain articles of personal property seized by the plt., as deputy sheriff, and delivered to the defts. on their receipts to return them on demand. There was a demand on one deft., who was defaulted, not having restored the property. Plt. nonsuited as to the other on whom there was no demand, and so no conversion. Art. 9. *Con.* 2 N. H. Rep. 546–547, White *v.* Demary & al.

§ 41. No conversion where the deft. holds property under a special contract in force, &c. as Hall, in error, *v.* Daggett and Kinsett, 6 Cowen, 653—657: D. & K., plts. below, brought trover against Hall for certain boxes and cases of provision preserved fresh, on an agreement between them and H. dated April 15, 1822, by which they agree to carry on the business of preserving fresh provisions warranted sweet and good for any voyage or climate, and agreed in consideration of the use of $600 advanced by Hall to them, that he should be the only agent for selling the provisions in the city of New York for ten years, he to have *twenty per cent.* on all sales made by him or through his agency in that city, &c. and one third of the net proceeds of the sales. He to furnish, at his expense, a suitable repository, &c. and be responsible for all sales made by him, or through him. The contract remained in force and he had not violated it. He held the boxes, &c. for his advances and services till a final liquidation. Held, trover did not lie, and D. & K. had no right to demand the goods delivered to Hall, under this contract, as he had an interest in them, and a right to detain and sell them pursuant to the contract, not only on account of his commission, but to reimburse his advances: 2. No usury. The plts. below had a verdict on the ground they offered to satisfy Hall's lien; but the court above held he had more than a mere lien. He had a right of possession for the special purposes of the contract, of course the plts., D. & K. had not the right of possession, and that 'the right of property was not enough.' Cited 7 D. & E. 9. 'The rights of the parties seem to be different from those of principal and factor generally.'

III. Ch. 77. Art. 12. Con.

§ 29. *Parol* evidence is not admissible to prove damages were given in trover for a thing not included in the declaration. 2 Const. R. 757.

CHAPTER LXXVIII.

WASTE.

Art. 1. Con.

§ 9. The writ of *estrepement* as well as the action of waste 'has fallen entirely into disuse and given way to a more easy, expeditious, and complete mode of proceeding *by bill in equity* to stay waste, either threatened or which the party is in the act of committing, and for an account of such waste as may have been already done. This course of proceeding, while it is open to many persons who could not take advantage of these legal remedies, at once unites the advantages of both by restraining, in the most expeditious manner, the commission of waste, and enforcing by means of the decree for an account, and compensation for *part*. An injunction may be granted to restrain *permissive* as well as *voluntary* waste.'

Eden, 115.—Caldwall v. Baylis, 2 Meries, 408.

§ 10. And in New York an injunction to stay waste will be granted, though no action at law can be maintained against the tenant; nor is it necessary in any case that there should be a suit pending.

Kane v. Vanderburgh, 1 John. Ch. R. 11.

§ 11. In Virginia the law of waste is not to be held precisely in the same manner in this country as in England, it must be varied according to the circumstances of our new and unsettled country.

6 Munf. 134.

Art. 3. Con.

§ 9. *Waste in fixtures* further, Eden, 108, &c. See Elwes *v.* May, ch. 76, a. 8: questions as to them arise between the heirs and executors, and the rule is rigid in favor of the inheritance, (in England.) 2. Between the executor of tenant for life, or in tail, and the remainderman and reversioner, where the executor's right to sever is viewed more in his favor: 3. Between the landlord and tenant, 'where the rule has been relaxed to the greatest extent.'

§ 10. The tenant has no property in the timber though demised to him, only an interest in the fruit and shade, as long as they are annexed to the land. He cannot cut timber where there is a demise of a farm, *including the trees;* for though there is no express exception, yet the law makes an exception of the trees, and the lessee cannot cut them down, because he has but a limited interest.

4 Co. 62.

Eden, 116.

Art. 4. Con.

§ 7. *The reversioner has case against a stranger for cutting trees on the land, though allowed by tenant for life.* The deft. cut down and carried away two trees in payment for his labor

done, and stakes and boards he found in repairing fences on the land, being employed by the tenant for life. Plt. recovered $7; trees were only fit for fire wood. Held, first, the tenant for life may cut trees for fire wood and fencing, but cannot sell wood to pay for fencing on the land: 2. But tenant for life can set trees for no other purpose, &c. In support of the action the court cited Cro. ch. 242; 7 D. & E. 13; 1 Saund. 3–22, note; 5 Co. Lit. 57; 3 Lev. 209; 11 Mass. R. 425; 1 Chit. on Pl. 49–142; 2 do. 336–344; 4 Burr. 2141; 11 Johns. 131: 13 do. 260: as to the right of tenant for life; 2 Bl. Com. 122; Co. L. 53; 1 Co. 48–81; 1 Dyer 36; Cro. Ch. 593; 11 Co. 82, Bowle's case; 1 Cruise, 62; 7 Johns. 236, 7 Bac. Abr. 253, title Waste, C: this case seems to be correct as far as it goes. It may be added buildings are on the same principles as fences are; and as to fire wood, see the reasoning post, art. 16, 2 N. H. Rep. 430–432, Elliot *v.* Smith. III. Ch. 78. *Art.* 4. *Con.*

§ 8. Case lies for injury done to the plt's. *reversionary* interest in land, by cutting and carrying away branches of trees growing thereon; also trover for the wood carried away: but if the plt. give no evidence of the value, he can have only nominal damages. 4 Barn. & Cres. 465–467.

As on a bill filed for an injunction to prevent *waste* in coal mines opened, &c. Held, it is not *waste* in a tenant in dower of coal lands, to take coal to any extent, from mines already opened, or to sink new shafts into the same veins of coal: 2. The tenant may penetrate through the seam already opened, and dig into a new seam that lies under the first. The mine had been worked to a very small extent in the lifetime of the husband. It was urged, the widow ought to work the mine no further than her husband did, in order that the inheritance be not impaired. This case was decided on English authorities, especially Clavering *v.* Clavering, 1 P. W. 388; and Stoughton *v.* Lee, 1 Taunton; so at present must near all cases of *waste*, in the United States, be decided. In New York the widow has dower in an *iron oar bed* her husband opened and worked in his lifetime, being the owner thereof, and of the land, &c. Art. 7. *Con.* 1 Rand. 258–268, Crouch *v.* Puryear. 1 Cowen, 460–480, Coots *v.* Cheever.

§ 2 *con.* Though waste by the act of God, as tempests, &c., is excusable, yet the tenant must repair it as soon as possible. Eden, 108. Art. 10. *Con.*

§ 10. *Manner of computing the amount of waste.* Ejectment for certain premises. Plea, not guilty. The lease contained a proviso for reentry if the lessee committed waste to the value of ten shillings, and the lessor reentered, and brought ejectment, because the lessee pulled down some old buildings of more than ten shillings value, and substituted others of a different description. Held, the waste contemplated in the proviso, was waste producing an injury to the reversion, and that it was a question for Art. 14. *Con.* 5 Barn. & Cres. 855–857, Doe *v.* Bond & al.

III. Ch. 78. Art. 14. Con.

the jury, whether under all the circumstances, such waste, to the value of ten shillings, had been committed. In this case the whole subject was left to the jury: the building up, as well as the pulling down, to consider if injury had been done to the reversion to the amount of ten shillings.

Art. 15. Con.

§ 17. An injunction may be granted on application of *mesne remainderman for life*, as well as on that of the remainderman in fee. Though he has no right to the timber, yet if the first tenant should die, he would have an interest in the mast and shade; and if the remainderman in fee were to allow the first tenant for life to commit waste, it would be *collusion*, and be *enjoined* by any one having a mesne remainder. The produce, however, must be laid up for intermediate and contingent remaindermen. Further, the right of the mesne remainderman for life, to interpose, is founded not so much in his *interest* as in his *enjoyment*. This is personal to himself, and in which the remainderman in fee has no concern. But this mesne remainderman for life, cannot be entitled to an account. This is the right of the owner of the inheritance alone.

1 Equity Cas. Abr. 400.

3 Atk. 95.

2 Atk. 95. Pigot v. Bullock, 1 Ves. Jur., 479--484.

But if tenant for life impeachable for waste has sold the growing timber, he cannot restrain the vendee from cutting it, by injunction or otherwise.

3 Ves. 787.

The court will *enjoin* the mortgagor in possession, from committing waste, as the whole estate is security for the loan. But he may cut underwood at proper seasons, and of a proper growth, in the ordinary course, and in a husband-like manner. The mortgagor may always take *the ordinary fruit of the land*. But if the mortgagor become a bankrupt, (or insolvent,) an *injunction* issues to prevent his taking the underwood, because the mortgagee has a right to have the estate sold, in the plight in which it was at the time of the bankruptcy, &c. Eden, 120, cites Hampton *v.* Hodget, 8 Ves. 105: but an action of waste will not lie in favor of a mortgagee against the mortgagor in possession, before forfeiture.

1 Dickens, 75.

Brady v. Waldron, 2 Johns. Ch. R. 146; 15 Johns. 205.

Bromley v. Fanning, 1 Johns. Ch. R. 501.

An *injunction* to stay waste lies not against a vendee, in favor of the mortgagor, who had sold the mortgaged premises, and who is liable for any deficiency.

Art. 16. Con.

The principle to leave as good as found, is often recognised, thence Eden, 107, and cases cited. If the tenant of a warren, fishpond, &c., 'take so much of the stock, or neglect the means of preserving it, *so there is not so much left as he found at the* time of the *demise*, it is waste.'

Art. 17. Con.

§ 1 *con. Injunction* to prevent waste, is not continued where the plt's. title is denied, especially if there has been delay and negligence in trying the title at law: see Eden on Inq. 233; 1 Bro. C. C. 57; 2 Ves. 51–784; 4 Johns. Ch. C. 21; Cooper's Pl. 149.

1 Hop. Ch. R. 342-3.

If the waste be trivial, the court will not grant an *injunction* to stay it; but a small degree of waste, the party manifesting an intent to commit more, is a sufficient ground for the court to act upon; and in case of waste it is the reversioner's business to apply to the court promptly. 1 Jacob & W. 631–633. III. Ch. 78. *Art.* 17. *Con.*

Trustees to preserve contingent remainders, may have injunction to stay waste, and before the contingent remainderman comes *in esse*, as they have the whole legal estate and inheritance, and ought to preserve it entire for all the *cestui que* trusts in remainder, whether vested or contingent, for the inheritanc consists of the land, mines, and timber, and cannot 'be preserved without preserving all three.' Garth v. Cotton, 1 Dicks. 183.

§ 1. July 1828. Statute of Gloucester, 6, Ed. 1. ch. 5; cited a. 11, s. 2, above. It is become an important question how far this statute is, and has been in force in Massachusetts. My opinion, as expressed above, is, that this harsh and severe punishment for waste, has never been in force in Massachusetts. My reasons, as far as given, are seen in this chapter principally, and especially in a. 11, 13, and 14. It will be observed, as stated a. 13, s. 5. that the opinion of Chief Justice Parsons is, that this punishment is, and ever has been the punishment here, that is, the forfeiture of the place wasted, with treble damages. He must refer to this statute, though he does not mention it, or any other, as there is no other law inflicting such a punishment. As his opinion was not called for, as he noticed no authorities, and it did not appear he had examined the point, and no case is found in practice to call his particular attention to it, I thought it only necessary to cite other English and American statutes on the subject, and briefly to observe upon them. Lately, however, the question has been made more interesting. Judge Jackson has published a treatise on real actions. In pages 340–342, has adopted Parsons' opinion, and expressed surprise at mine. When the opinions of two such eminent lawyers are opposed to mine, I think I ought to relinquish it, or further to defend it. On reviewing the whole ground I cannot give it up; because, 1. My opinion is grounded on the common law, and the statute, 52 H. 3, ch. 23, that gave the injured party only full damages for waste, as stated a. 11, s. 1, above; also on Massachusetts statutes of 1700; cited a. 13. s. 4. merely making tenant in dower liable to an action for any strip or waste. It appears to me, this never could mean an action for *the place wasted and treble damages*, in the severe spirit of the statute of Gloucester; but that it means an action for 'the full damages,' in the spirit of the common law, and of the 52 H. 3, ch. 23: 2. further reasons, as stated in another place forty years ago: C. J. Dana and others held, invariably, that where our ancestors adopted the common law, they adopted the Brit- Art. 18. *Con.*

III. Ch. 78. Art. 18. Con.

ish statutes enacted *in amelioration* of that law, and rarely, if ever, British statutes increasing, and especially severely, the penalties of the common law, on this principle, most clearly true, because they thought the spirit of our system has ever been far more mild than that of England. Therefore, in adopting laws from England by our ancestors, a milder, and not a severer temper has ever prevailed. Again, by our statute of March 11, 1784, cited a. 1, s. 6; a tenant in dower forfeits for waste the place wasted, '*and damages assessed.*' Is it possible our legislature by these words, '*damages assessed,*' could mean *treble* damages? If it be thought our legislature, in passing these acts of 1700 and 1784, believed the statute of Gloucester was in force here, and meant to conform to it, why did they not adopt its language, at least its very plain meaning? If it be said, the legislature in 1700 and 1784, intended to reenact here the statute of Gloucester, as it was common here to reenact British statutes, it may be asked why, when the words of that statute were so few and plain, the legislature did not reenact its words, at any rate, its obvious meaning? In the case of waste, pending actions, &c., when the legislature intended *treble* damages, it called them, very naturally, *treble* damages, and not '*damages assessed.*'

3. a. 11 s. 3. It appears if there be tenant in dower, &c. and a stranger commits waste against her will, she can recover of him only single damages in trespass *vi et armis*. How unjust must be the law to make her forfeit the place wasted, and treble damages, when in fact not in fault, and then give her only a remedy to recover of the only wrong doer in the case, single damages alone.

4. Neither the Chief Justice or Judge Jackson noticed the 52 H. 3 ch. 23, or either of the above cited Massachusetts statutes; but Mr Jackson, to shew our ancestors sometimes, adopted penal British statutes, has in his objections to my opinion brought into view the two writs of *casu proviso* and *consimili casu*, as having been adopted by our ancestors, pages 233, &c. in his treatise, and gives an account of them. On attending to them it will appear that when a tenant for life alienated a larger estate than his own, and thereby, on the principles of the common law, forfeited his own estate, by that law, he in remainder or reversion could not enter or have a remedy as soon as he ought to have, and therefore, parliament enacted these two statutes, giving the two writs to hasten his remedy. These statutes are no more penal than the common law is, and have no reference to the point in question. See 6 E. 1 ch. 7; 13 E. 1 ch. 24. My ground is that our ancestors in America were not in the practice of adopting British statutes more penal than the common law, especially far more penal, as is the statute of

Gloucester; hence, if it be contended they adopted such statutes, there ought to be proof of the fact; but no proof of the fact is produced.

5. As to practice and operations—Gov. Sullivan's opinion extends back 60 years, as stated art. 13, s. 3, above. Nor does Judge Jackson or any other Judge or lawyer, to my knowledge, name a case in which there has been in a single instance for two centuries, a recovery *of the place wasted and treble damages* for waste. When in Palmer and wife *v.* Downer, there was a question if our ancestors adopted the 11 and 12 W. 3, ch. 6, respecting aliens, the court did not admit the adoption until after many cases were produced to prove the fact that our ancestors actually practised on that statute; then shall we presume the very penal statute of Gloucester, to have been here adopted near two centuries, without a single case in proof of the fact, and in direct opposition to a fair construction of our own statutes.

6. Ch. 196, a. 7, s. 1, it appears Carolina, in 1712, (then including all the U. States south of Virginia,) by a provincial statute, adopted 126 British statutes, among them, we find 52 H. 3 ch. 23, but not the statute of Gloucester, 6 E. 1 ch. 5; thus Carolina in 1712, left waste at the common law as to the three legal estates in dower, courtesy, and guardianship, and on the statute of 52, H. 3. ch. 23. tenants for life and years by contracts. Nor have I been able to find that the statute of Gloucester has been practised upon in any State in the Union. A. D. Sept. 1828, the Supreme Judicial Court confirmed my opinion in the case of *dower*, since writing this 18th art. as above, the only case that has been in controversy between C. J. Parsons, and Judge Jackson and myself. It was in a case of *dower*, C. J. Parsons said the tenant in dower forfeited *treble* damages, &c. for waste. His opinion Judge Jackson quoted and adopted; this opinion I have opposed, saying she forfeits but *single* damages; my confidence in my opinion in this *dower* case, has rested mainly on the two Massachusetts statutes of 1700 and 1784, above cited. I have not aimed to establish any other point; as to the other observations in this article, they are viewed as merely confirming in no great degree, the *dower* case; hence the other decision of the said court, that the *lessee for life* forfeits *treble* damages, &c. I may, on the whole, admit; the only question I make is whether Massachusetts did not adopt said 52 of H. 3, and omit the said statute of Gloucester, the milder course, as Carolina did.

Carder *v.* Miller, Mass. Rep.

Action of Waste; plea no waste. Sept. 1827, the action related to several pieces of land; the verdict did not specify the places in which the waste was committed. Held no judgment could be given to recover the places wasted. New trial granted.

5 Pick. 191—192, Sackett *v.* Sackett.

III. Ch. 79.
Art. 1.
Con.

CHAPTER LXXIX.

WAYS.

§ 4. 2 Pick. R. 162, it is stated there has been in Massachusetts no dedication of a way, as there has been in England; and there is no right or way of landing, though there has been
1 Greenl. 111. a general usage for thirtyfive years, of landing lumber, &c. on the bank of a river, but without any claim of right or intention to occupy the land to the exclusion of the owner's right; there is in such case no ground to presume a grant. Cited Holcraft *v.* Heal, &c.

§ 5. Trespass q. c. f. The plt. granted a right of way *across his field.* Held, the grantee had no right to enter at one
5 Pick. 163—167, Comstock v. Van Deusen. place, go partly across, and then come out at another place on the same side of the lot: 2. Parol evidence to shew such was the intention of the grant, is inadmissible: 3. Dragging timber from the grantor's wood lot on the plt's. land, for the purpose of turning it round was a misuse of the right of *way.* The words *across the lot,* must be taken in their usual sense.

§ 6. *General principles growing out of usage.* Held,
Harlow v. Humeston, 6 Cowen, 189—193. though the statute 1 R. L. 277 requires public roads to be four rods wide, and if laid out under the act, they are to be deemed so wide: yet 2. Where claimed not under it, but by *reason of usage,* or user for twenty years or more, they may be less than four rods wide: 3. All the land within the highway fence is not necessarily subject to the right of way; and if not, it may be occupied by the owner. And if he place an obstruction there and another is injured by it, he is not therefore liable: 4. Though such obstruction be within the highway, he is not liable, unless the person injured exercise ordinary diligence to avoid it: 5. If a man's servant, in the ordinary course of his business, obstruct the highway, from which the traveller receives a special injury, the master is liable: 6. In trespass for laying wood in the highway by such user, by which the plt's. horse, being frightened, ran upon it and was killed, the road in fact being but two rods and a half wide, and it being questionable on the evidence, whether the wood was laid within the road, as established by user, though it lay within the road fence on the land of the deft., held, it should have been left to the jury to find whether the wood was in the highway: 7. As to the servant and master, the master is liable, if the servant can justify in the master's action against him, as where the master has been accustomed to do thirty-
1 Hill, 80. eight years himself what the servant does.

III. Ch. 79. *Art.* 2. *Con.*

§ 1. The committee to lay out the way must all act. 2 Pick. R. 70.

On said statutes the session has power to subject the petitioners to bear the expense of its location. This may be a condition to granting the prayer of the petition, but they are not obliged so to do. Any small variation from the petition does not alter the case; stat. 1786, ch. 7, Maine stat. 1821, ch. 118, s. 10, nor is a town held to make or repair a road until it can legally enter on the land to do it: Stat. 1821, ch. 118, s. 17: plt. sued the town of Rome for an injury to his horse occasioned by a defect in a supposed townway.

2 Greenl. 50—55. pp. 55—61.

§ 2 *con.* Held, if the laying out of a highway be returned and filed with the town clerk, it is a sufficient recording of it. Towns must repair bridges. See art. 11, s. 9.

2 N. H. Rep. 309. p. 513.

Trespass on the plt's. wharf and landing place; plea not guilty: 2. A townway. Held, 1. The selectmen have no power to lay out a landing place or a townway between high water mark and the channel of a navigable river: 2. A vote of a town that the selectmen shall lay out a particular town way is improper and unauthorized, the law intending the selectmen shall exercise their own discretion: 3. The acceptance of a townway must be at a town meeting, called for that purpose after the laying out by them, and by a warrant containing notice that the report of the selectmen as to the way laid out by them is to be considered at such meeting. The deft. moved a store as a nuisance; decided May, 1828.

5 Pick. 492—495, Keen v. Stetson.

§ 9. Principles of a statute way in New York. Where a way is laid out through or over improved land, the owner or occupant has forty days to appeal and thirty days more to elect the mode in which he will have his damages assessed; after that time he loses his right to have them assessed, by three commissioners appointed by a Judge of the Court of Common Pleas; but afterwards his damages may be assessed in the common way by two Justices of the Peace and a jury of twelve freeholders; and if so assessed, the board of supervisors are bound to have the amount levied and collected according to the act. As to soil of a way see art. 3, s. 12: So *summary* proceedings: justice and constable, *ministerial* so not liable, &c. ch. 172, a. 8, s. 11.

Johnson v. Supervisors of Herkimer, 19 Johns. R. 272.

§ 10. A road used as a common highway since the year 1777, but not recorded as such, is not a public highway within the meaning of the act, (sess. 36, ch. 33, s. 24,) so as to render an obstruction of it a *nuisance*. But such are twenty years before March 21, 1797, adjudged to make the road such way. Such use 12 years is *prima facie* evidence of laying out. An overseer of the highways must serve or incur a penalty. He is not liable for error in judgment in a private action. Is only liable

The people v. Lawson, 17 Johns. R. 277. 7 Johns. R. 106. 2 Johns. R. 424. 11 Johns. 432. 10 Johns. R. 470.

III. Ch. 79. *Art.* 2. *Con.*

to a penalty for negligence, by statute. id. On an appeal from the decision of the commissioners of highways to three judges of the common pleas, under s. 36th, act, (sess. 36, ch. 33,) if the decision be reversed, *a certiorari* lies as well for them (the commissioners,) as for the appellants, to remove the proceedings into the Supreme Court. 15 Johns R. 537. As to rivers being highways, see ch. 68, a. 2, s. 7; a. 6, s. 10; 1 Cowen 23—23, minute proceedings.

Crawford v. Snowden, 3 Litt. 228.

§ 11. The consent of the proprietors of land where the road is to pass, must be given in court: 2. The commissioners appointed to view it have no right to receive and report the consent.

1 Litt. 196.

Cates v. Wadlington, 1 Mc Cord, 580.

§ 12. Where a river is merely *capable* of being made navigable, though the claim of each owner of the adjoining lands extends *ad filum aquæ*, yet he has not such exclusive right to such river, but that the legislature may declare it a *public highway*, whenever the obstructions are removed and it becomes fit for public use: 2 The English rule of law, that no river is navigable except where the tide ebbs and flows, is not applicable to this country: 3. That cannot be considered as a navigable river, (so a highway,) the natural obstructions of which prevent the passage of boats of every description.

§ 13. Harrington *v.* Commissioners of Roads, (South Carolina,) held, their decisions on a question within their jurisdiction, is final; 2 M'Cord, 300: a clerk of the court is not liable to work on them; p. 400.

§ 14. The People (of New York) *v.* the Commissioners of Highways of the town of Salem, 1 Cowen, 23–32; forms and minute statement of proceedings to a *mandamus*, as to laying out one road and discontinuing another, on said statute of session 36, ch. 33, entitled 'an act to regulate highways.' 1. Step; a petition of individuals (one of freeholders on oath) to said commissioners, stating the proposed way is *necessary and proper*, describing it; also, the old way to be discontinued, and prayer accordingly: (notice of course;) 2. The commissioners met, viewed, heard parties, and decided against the application: 3. The petitioners, by petition, appealed to three judges, by name of the court of common pleas of the county, out of court: 4. They viewed, and heard the parties, and reversed the said decision, and decided the way prayed for was *necessary*, and that the old road ought to be discontinued, and ordered the said commissioners to do accordingly, October 19, 1819: 5. A writ of *certiorari* from the supreme court to the said judges, to make return of their record. Return was made minutely, containing their record. Among other things, their view on the ground and reasons of the opinions, under their hands and seal, July 12, 1820: 6. Supreme court (continued to advise, &c.) affirm-

ed the said judgment of the three judges, January term, 1822, August term, 1822, a *mandamus* issued to the said commissioners, to compel their obedience, and to do as the three judges had ordered. This *mandamus* briefly stated all the proceedings, beginning with the said statute enacted March 19, 1813, stating its date and title, as ever ought to be done, (not chapter.) In this act is an important provision, which directs 'that it shall not be lawful for any commissioners of highways to lay out any road through *improved* or *cultivated* land, without the consent of the occupant or owner thereof, unless upon the application of twelve reputable freeholders of the town in which such road shall be laid out, certifying upon oath, that such road is necessary and proper; and that all *public* roads to be laid out by the commissioners of any town, shall not be less than four rods wide,' &c. &c. See 2 Caines. R. 179–182; 16 Johns. R. 61.

§ 15. The power of the judges of the common pleas, and in said statute for regulating highways is strictly appellate, and they cannot lay out a road different from that submitted to the commissioners. 1 Cowen, 142.

§ 16. The commissioners must all be present, but a majority may decide. A right of public way must be pleaded. 1 Cowen, 138–140.

§ 17. Cannot be where mill buildings are. Clark *v.* Phelps & al., 4 Cowen, 190–206.

§ 12 *con.* Nor can the public justify turning cattle thereon for the purpose of grazing; and see fences ch. 66, a. 3, s. 1. 16 Mass. R. 33–38. Art. 3. *Con.*

If a way be laid out over my land, and I sell my land bounding it by the way, each side of it, the land in the way does not pass, not by *description*, for in that it is not included, not as an *incident*, being itself a distinct parcel of land. Way is a mere *easement*, and does not affect the covenant of *siesin* laid out in a summary manner, ch. 196, a. 8, s. 8, ch. 172, a. 8, s. 13. Jackson *v.* Hatheway, 15 Johns. R. 447, p. 483.

§ 18 *con.* A plea of a highway, time immemorial, is supported by proof of the existence of the way for sixty years, there being no evidence showing its commencement. 5 Pick. 421, Odiorne *v.* Wade.

Plea, 1. A right of way by prescription from the upland, across the plt's. salt marsh, (*locus in quo*) to the defts'. salt marsh, in the fall and winter, where most convenient to the defts., and least prejudical to the plt., for the purpose of getting the produce of the defts'. marsh, and of improving and managing the same: 2. A right of way of the same kind and extent by a nonexisting grant. Replication *de injuria*, &c., and issue. It appeared in evidence the defts. passed over the plt's. marsh in different places and in different directions, not confining themselves to any particular course or cart path, but going wherever it was most convenient to them, taking care only to avoid places 5 Pick. 485–487, Jones *v.* Percival & al.

III. Ch. 79. *Art.* 3. *Con.*

where their passing would be most injurious to the plt. Held, such a way could not be prescribed for, and that such a grant could not be presumed. Decided May 1828; verdict set aside and a new trial granted.

Ch. 79; 2 Pick. R. 574–578, Russell *v.* Jackson, as to ways of necessity; a. 4, s. 8.

Art. 8. *Con.*

§ 6 *con.* But the person injured by the logs, &c., in the road, cannot have his action for damages unless he uses *ordinary care* to avoid the obstruction. Butterfield *v.* Forrester, 11 East. 60; Flower *v.* Adams, 2 Taunt. 314: but such obstruction may be indicted; same principle a. 1, s. 6, this chapter.

2 Pick. R. 622, Smith *v.* Smith.

3 Pick. R. 267—269.

But towns are liable to individuals under statute 1786, ch. 81, s. 7; for an injury occasioned by an obstruction in the highways, (as large stones left in it.) Bigelow *v.* inhabitants of Weston, was an action on the case for double damages on said statute. 3 Pick. 288; 3 Greenl. 438–440, as to notice.

But 2 N. H. Rep. 392, though highways are so low as to be overflowed, towns are not liable for injuries on them, if it were imprudent to pass in such a condition, as if they were passed unskilfully.

2 N. H. Rep. 97.

Individuals over whose lands a road is laid by a committee, have a right to object to the acceptance of their report.

Roads and streets where presumed to be dedicated to the public by the owner of the land. See several cases and various opinions; 2 Strange, 909–1004; 5 Taunton, 137; Matthews on presumptive evidence, 318; 1 Camp. 260; 11 East, 376, n.; 7 Johns. 106.

Art. 9. *Con.*

§ 3. When borderers are injured in repairing ways: see Leader *v.* Moxon, and ch. 69, a. 2, s. 9, Callender *v.* Marsh.

Art. 10. *Con.*

§ 1 *con.* 1 Pick. R. 180, 189, Commonwealth *v.* the Inhabitants of Charlestown, held, an inlet from the sea which is navigable to any useful purpose, is public property, and an order of the court of sessions for laying a road over it is void; and if a road be laid out, or bridge built recently, not by lawful authority, the town is not held to repair either. The inlet is where the tide ebbs and flows, and is navigable from the sea; seventyfour feet wide at the bridge, and ninetysix feet deep at high water, and the bridge one hundred and ninetysix feet long.

1 Pick. R. 345. 346.

The statute of 1820, ch. 65, as to the law of the road, applies to the streets in Boston and other populous places: 2. A person driving a vehicle across the street, must see he does not interfere with others in the proper exercise of their right of passing.

4 Pick. 125. 126.

§ 2 *con.* Under statute of 1820, 'the travelled part' of the road, means the centre of such part which is usually made for travelling, and not any tract which may happen to be made in the road by passing of vehicles.

§ 7 *con.* If the road be out of repair, the surveyor must re-

pair it with *the consent of the selectmen;* Massachusetts statute 1786, ch. 81; Maine statute 1821, ch. 118, s. 13; 4 Pick. 149–152, Jones *v.* Inhabitants of Lancaster. 3 Greenl. 445. III. Ch. *Art.* 10. *Con.*

§ 14 *con.* 1 N. H. Rep. 16, the same principle; and if surveyors of highways in making or in repairing them, cut and convert to their own use wood growing there, they are trespassers; Makepeace *v.* Worden & al.

17 *con.* 2 Pick. R. 547–550, held, when the common convenience is not sufficient to warrant the laying out of a highway, wholly at the town's expense, the court of sessions cannot adjudge it to be sufficient, in consideration of a bond having been filed by an individual, to relieve the town of part of the expense, because the public convenience and necessity alone, must be the moving cause; so is the statute.

§ 9 *con.* If a bridge be built by individuals and dedicated to public use, and the public used it so long as to prove its public usefulness, it must be repaired by them. In New Hampshire this duty devolves on the towns, and in no case on the counties. State *v.* Town of Compton, 4 Barn. & Cres. 194, in England. Art. 11. *Con.* 2 N. H. Rep. 518–515.

§ 16 *con. Trespass for destroying part of the plt's. wooden bridge.* A, the owner of the land, for a valuable consideration, gave parol license to B to build a bridge on it; and then A cut down a part of it and took it away, without B's consent. Held, trespass could be supported by B against A: 2. If there be a *parol* agreement for a right of way, or other interest in land, and any acts be done in pursuance thereof, prejudicial to the party performing them, and in part execution of the contract, the agreement is not affected by the statute of frauds. The agreement was, that Ricker & al., the plts., should do certain work for Kelly, the deft., which the plts. performed: that the deft. should permit the plts. to build the bridge, and have a way to it on the deft's. land. Hence, this *parol* agreement clearly involved in it an *interest in land.* Defence was, that the bridge was erected on Kelly's land without license, and against his will. Replication was the said agreement. Demurrer to it, because the plts. stated no legal conveyance of the land, &c., and 'because it did not appear that said license was *in writing*, nor how long it was to continue in force.' Many authorities were cited, as Cook *v.* Stearns, ch. 26, a. 5, s. 4; Pomfret *v.* Ricroft, id.; Wells *v.* Banister, ch. 69, a. 4, s. 9; Taylor *v.* Townsend & al., ch. 79, a. 4, s. 11; Davenport *v.* Mason, ch. 93, a. 3, s. 41: Crosby *v.* Wordsworth, ch. 172, a. 3, s. 4; Harrison *v.* Parker, ch. 172, a. 3, s. 6; Winter *v.* Brockwell, ch. 74, a. 10, s. 6, 7; also 7 Ves., Jr., 341; Ambl. 586; Stra. 783; 2 Vern. 455; 3 Atk. 1; 2 Cain. 87. The county is *prima facie* liable to support bridges.

Unity of title, or of possession: Hagard *v.* Robinson, 3

III. Ch. 79. *Art.* 11. *Con.*

Mason, 272–280. According to this case, and the many authorities cited in it, the rule is this: if by such union or unity, the easement, as a way, a right to make back water to an upper mill, a right in A to flow B's land, &c., is actually extinguished, and really ceases to exist, such easement is gone forever, unles it be *by nature and of necessity*, then it is only suspended during such union, and revives on the separation, and restoring the estates to the situation they were in when the easement actually existed and was enjoyed: see ch. 71, a. 5, s. 19, facts in this case. As to the suspension, A owns a tenement D, to which an ancient gutter runs through B's tenement. A buys that, and then sells his tenement D, to C: held, the gutter was not extinguished. But had the gutter been destroyed would the separation have revived it? This point seems not to be settled. A distinction has been taken between an easement, &c., created by *contract*, and one *jure naturæ*. This is true in some cases, not in all; for during union the owner of both has an absolute right to do as he pleases with the easement and estate; and it is a material question what he then does. For instance, the case of the *natural* gutter, A, while the union continued, made a cellar and built where it was, so completely destroyed it, turned the stream in a new direction; is not the old gutter gone forever?

CHAPTER LXXX.

SELECT RULES, AND CASES IN EVIDENCE.

Art. 1. *Con.*

§ 14 *con.* 17 Mass. R. 303–329, Dwight *v.* Pomeroy, &c. The rules of evidence are the same in courts of equity as those of common law: said on a bill of equity on statute 1817, ch. 87.

4 Rand, 346–351.

§ 17 *con.* 1. Generally, no party is required to prove more than he alleges, unless the fact not alleged, is necessarily implied in the facts stated in the pleadings: 2. Matters implied in those alleged, are presumed to be proved, after verdict: 3. Matters collateral to the fact in issue and necessary to the party's right, if not alleged, are not presumed to be proved. Hence the omission is not cured by verdict, at common law.

1 Barn. & Cres. 77.

Where the plt. may prove more, &c. The count stated that A B supplied the poor of the parish of W, with provisions; proof he supplied said poor and other parishes in a workhouse. Held, no variance, the proof being larger than the allegation. And pp. 150—156; 2 Rand. 431.

5 Barn. & Cres. 909–916, Saunderson & wife & Lydia White *v.* Griffiths.

§ 18 *con.* The plts., in their declaration, stated an agreement made between them and the deft., that the plts. agreed to let to him, certain premises therein described; stating the agreement; that the deft. became tenant to the plts, and in

consideration, *they* promised him to perform all things in the agreement by them to be performed; he promised, &c. The agreement given in evidence, purported to be made by an agent of said wife and by L. White, only, but not by Saunderson, but subsequently he received rent of the deft. Held, the *promise* was not proved as laid in the declaration, as Saunderson was not bound by the agreement till he received the rent, so not a joint contractor *ab initio*, as was the import of the declaration. *So probata non secundum allegata.* Cited 2 B. & C. 20; 6 East. 364, &c. III. Ch. 80. *Art.* 1. *Con.*

§ 48 *con.* This maxim extends to cases where the answer may subject the party to a criminal prosecution, or involve him in shame and reproach. He may be compelled to answer a question, the answer to which may affect his interest *civilly*. Baird *v.* Cochran, 4 Serg. & R. 397; *contra*, Bett's Case, 1 Browne, 376, but was in the Common Pleas. Why should a man be compelled to lose his property to serve another? If such answer respects the public safety, the answer perhaps may be required. 4 Serg. & R. 400, also 3 Yeates, 429—437 & 438.

A witness was excused from answering a question which might have subjected him to a prosecution; also held, his declarations as to the same facts, affecting a third person's character, were inadmissible. The court would not allow a witness to be asked a question, his answer to which might accuse himself of fornication with the plt. sueing for a breach of promise of marriage, but told him he was at liberty to answer or not, that he was under no obligation to criminate himself. 1 Phill. Ev. 222; 3 Taunt. 424; 13 East, 53; 13 John. 82, 229; see ch. 192, a. 6, s. 19. 2 M'Cord, 230. 6 Cowen, 254—261, Southard *v.* Rexford.

§ 81. The deft. promises the plt. to pay him a certain sum, but his promise to be void, if a certain event happen at certain places, and at a certain time. The deft. must prove the event has happened, in order to avoid his promise. 17 Mass. R. 188—190, Gray *v.* Gardner, &c.

§ 82. *Discordant testimony.* The doctrine that if witnesses concur in proving a material fact, they are to be believed as to that fact, whatever may be the other contradictions in their testimony, is to be cautiously received. The maxim *falsus in uno, falsus in omnibus*, is to be applied, where the witness *must* know the fact is otherwise than he states it to be, not in cases in which there may be honest mistakes. 7 Wheat. 338.

§ 15. In the time of Massachusetts Province, a slave was transferred to a grandchild of the owner. Held, in *assumpsit* as to maintenance, the declarations of the parties at the time of the transfer, were part of the *res gesta*, and so evidence as to the settlement. Art. 4. *Con.* 16 Mass. R. 108—110

III. Ch. 80. *Art.* 4. *Con.*

Trover for a quantity of wool, yarn, &c., the plt. delivered to one Scholfield, who absconded, and the deft., a deputy sheriff, attached it. S. was to manufacture it; the plt. called on S. to learn what progress he had made. S. showed him some wool, yarn, &c. which he said were the plt's. Held, this declaration of S. was admissible in evidence as a part of the *res gesta* to prove the wool, &c. were the plt's. property. S's. declaration was about a week before he absconded, and before the attachment.

4 Pick. 378—380, Pool, Jr. v. Bridges.

CHAPTER LXXXI.

BOOKS IN EVIDENCE.

Art. 2. *Con.*

§ 27. Books of a notary public deceased, proved to have been regularly kept, are admissible in evidence to prove a demand of payment and notice of non payment of a promissory note: 2. Strictly, only in the case of a foreign bill of exchange is a protest necessary, and in that only is it evidence: 3. It is a principle that memoranda made by a person in the ordinary course of his business, of acts required by his duty therein to do for others, are, in case of his death, admissible evidence of acts so done. Hence the acts of a public officer are admissible, though they may not be strictly official, if they are according to general usage, and the ordinary course of his office. In this case the book produced was proved by a witness to be the book of the notary, in which he entered his notarial acts. In this case the note was entered in it, and thereto annexed this *memorandum*, 'endorser duly notified in writing, 19th of July, 1819, the last day of grace being Sunday the 18th, Washington Perkin,' the notary's name; admitted on argument; the note was payable on Saturday; some stress was laid on the practice of protesting promissory notes.

§ 28. A parish register of marriages, births, and deaths, kept pursuant to the act of 1715, (N. Car.) is good evidence to prove pedigree, and that the several persons whose pedigree is thus proved, are within the savings of the statute of limitations; 2 Murphy, 47; but is no evidence of the place of birth. 5 B. & C. 508.

§ 29. In an action by a book-keeper of a bank to recover money overpaid to the deft. in consequence of a short charge of a check, held the plt's. books unaccompanied by his oath, (the check not being produced) was not admissible. 2 M'Cord, 157. Nor are the books of a *schoolmaster* admissible to prove his account of schooling. id. 328.

§ 30. Nor are the jailor's books of entries, evidence as to commitments, &c. of prisoners, in the sheriff's actions for their maintenance. 1 Const. Rep. 129. III. Ch. 81. *Art.* 2. *Con.*

§ 31. A book account may be proved, by proving the hand writing of the clerk, who made the entries, if he be out of the State. 2 M'Cord, 350; other cases, 428.

§ 14. Action of waste. One Ellis was the grantee in, and had possession of a deed, constituting a link in the plts. deduction of title; and, on affidavit, he withheld the inspection of the deed from the plt. by means whereof he was embarrassed in stating his title in his declaration, and could not safely try his cause. A. C. Paige moved for a rule on Ellis requiring him to allow the plt's. attorney to take a copy of this deed. Cited Wallis *v.* Murray, 4 Cowen's R. 399; 19 Johns. 268; 12 id. 225; 2 Campb. R. 14, &c.; 4 Taunt. 161. Cited contra, 2 Cowen's R. 532. Art. 3. *Con.* Davenbagh *v.* M'Kinnie, 5 Cowen, 27–28.

Curia. 'If the action were upon contract, and the motion unobjectionable on this ground, we would not grant the application. It is aimed against a third person not interested in the cause; and seeks to pry into his private papers. If the plt. deem it material, he must *compel* its production by *subpœna duces tecum*, or in some other way than by motion.

§ 15. Held, the deft. could not compel the cashier of the bank to produce the books or papers, by a *subpœna duces tecum*. The court said the course for proving the books or papers of a bank, when it is the adverse party, is to give notice to produce them, and on its non compliance, to show the contents by inferior evidence in the cause. 'The effect of this motion (for a *duces tecum*,) said the court, would be to compel a party to produce evidence against himself.' 'True the books are ordinarily in the possession of the cashier; how? He holds them as the officer, the agent, or servant of the bank; in the same manner as an attorney holds the papers of his client. The cases in which the production of papers may be coerced by *subpœna*, are, where they are the property of a competent witness; or at least, where they do not belong, exclusively, to the adverse party; when he can say *these are my papers*.' Same principle, 6 Cowen, 62; add to Cogswell *v.* Dolliver, s. 3, 2 N. H. Rep. 193—197, like case. Utica Bank *v.* Hilliard, 5 Cowen, 419—420.

§ 5 *con.* 1 N. H. Rep. 19, Bennett *v.* Davis, the same principle as in Cogswell *v.* Dolliver, and Catling *v.* Skoulding. Art. 4. *Con.*

On an inquiry into very remote transactions, accounts kept by a deceased party at the time, admitted as *prima facie* evidence, leaving the *onus* to the other party to impeach them. 1 Jacob & W. 65.

2 Murph. 314. Where a party is admitted to swear to his own account books, evidence he is a man unworthy of belief on

III. Ch. 81. *Art.* 4. *Con.*

oath, is admissible. Kitchen *v.* Tyson; Cooke 388, an account for the hire of a horse may be proved under the book-debt law.

§ 9 *con.* *Assumpsit* for money had and received, on the ground a depositer had overdrawn, &c. Held, 1. The books of the bank are evidence to prove receipts and payments of money: 2. If the clerk who made the entries, be dead, or insane, the book is admissible, proving his handwriting: 3. A depositer has a right, on proper occasions, to inspect its books, and the bank officers having charge of them so far are agents of both parties: 4. If a bank sue a depositer believed to have overdrawn, in consequence of a mistake in the ledger, the clerk, who made it, is a witness on the part of the bank, not being liable to it, or if at all is but on a contingency: 5. Where an account is balanced by merchants, and the balance carried forward, it is closed and the parties cannot go behind it, without leave obtained on a bill in chancery, &c.: 5. The statutes of limitations begin to run on a balance so struck as soon as settled. Ch. 152, a. 1, s. 6; s. 6 ante, ch. 161, a. 7, s. 1; 2 Ves. 400; Barber *v.* Barber, 18 Ves. Jun, 286; a. 3, s. 13; a. 4, s. 18; ch. 90, a. 1, s. 4; a. 5, s. 8; a. 12, s. 9; 1 Strang. 93, 647; 12 John. R. 461; ch. 82, a. 1, s. 6; ch. 81, a. 4. s. 9; 4 Mass. R. 518; 1 Binn. 217; 15 East. 32; ch. 81, a. 5, s. 10, 13; 10 John. R. 271.

8 Pick. R. 96-114, Union Bank *v.* Knapp.

§ 19. A plt., a shopkeeper, sued the deft. on an open account: most of the items were for spirituous liquors. Held, he might recover his account on proving it in the usual manner by his books, without proving he had a license to sell them, &c. So a miller's books, who swears to the original entries he made, is admissible evidence to prove the quantity of timber furnished from his saw-mill to the deft. A merchant and tradesman's books of original entries, are good evidence to prove an open account to a jury, when sworn to by the merchants and tradesmen themselves. So the books of the owner of a ferry for ferriage. 2 Nott & Mc Cord, 471. But not a scrivener's books for his services in his line and for commissions: 2 Bay. 157: nor a planter's books. Id. If one partner in trade, who made the original entries, be out of the State, the other partner may be permitted to swear to his handwriting in the books; and these entries are *prima facie* evidence of the delivery of the goods specified. 1 Bay. 40-480; 2 Bay. 382; 1 Dall. 35, 239, 276; 4 id. 133.

1 Mc Cord, 431.

p. 517.

2 Bay. 172.

§ 20. In Pennsylvania entries made in shop books by the party himself are evidence to charge the deft. in two cases only: 1. Where goods are sold: 2. Where work is done. It is not evidence to charge so many days of wharfage, and

Williams & al. *v.* Israel, 1 Browne, 257.

where evidence, it must always be corroborated by the party's oath. A day book is *prima facie* evidence of the prices of goods as well as of their sale and delivery; but not of money lent or cash paid. 1 Dall. 239; 1 Yeates, 347.

§ 21. Generally, however, the law fixes no price or precise time, at which the entry in the tradesman's books shall be made: if at or near the time of the transaction it is sufficient. The price is usually capable of other proof. If the book appear on examination of it, or of the party in court, not to be a book of original entries, the court may reject it, otherwise it must be submitted to the jury. 4 Serg. & R. 3-6, Curren v. Crawford.—5 Serg. & R. 404.

§ 22. *Commercial books in France.* Merchants, there, are a well defined class, and generally subject to the tribunal of commerce. By art. 8 of the Commercial Code every merchant is required to keep a journal, or day book, which duly shows his debts and credits, his commercial transactions, negotiations, acceptances, or endorsements; and generally all his receipts and payments of every kind. It must show monthly the sums expended for his household—the whole independently of other books used in commerce, but which are not indispensably necessary. He is required to place on file the letters he receives, and to copy in a register those he sends away. Art. 9. He is required to make yearly, under his signature, an inventory of his property, real and personal, of his debts receivable and payable, and to copy it every year in a register specially kept for the purpose. Art. 10. The journal and register of inventories must be marked and certified once a year: this is done by a magistrate. But letter books are not subject to this formality. The article requires the whole to be kept in the order of dates, without blanks, chasms or marginal references. Art. 11. The books ordered in articles 8 and 9 must be marked and certified by one of the judges of the tribunal of commerce, or by the mayor or his assistant, in the ordinary form, free of expense. Merchants must preserve these books ten years. But, by art. 12, account books, regularly kept, may be admitted by the judge as evidence of commercial transactions between merchants. By the thirteenth article, if not so kept, they are not evidence for those who keep them. Art. 14. Books and inventories cannot be ordered to be brought into court, but in cases of inheritance, community of property, adjustment of partnership accounts, and failures. Art. 15. But in legal controversy the books may be ordered by the judge to be produced, even *ex officio*, for the purpose of extracting from them what concerns the matter in dispute.

§ 22. Art. 84. Exchange agents and brokers are required

III. Ch. 81. *Art.* 4. *Con.*

to keep a book in the mode prescribed by art. 11. They must enter in this book daily and in the order of dates, without erasures, interlineations, references, abbreviations, or ciphers, all the conditions of sales, purchases, insurances, negotiations, and, in general, all the operations of their business. Art. 85. An exchange agent or broker cannot in any case, or under any pretence, effect commercial or banking operations on his own account. He cannot be interested, directly or indirectly, in his own name, or under a borrowed name, in any commercial enterprise. He cannot receive or pay any money for the account of his employers. Art. 86. He cannot become guarantor for the performance of the bargain, which he makes for his employers.

CHAPTER LXXXII.

CERTIFICATES AND COPIES IN EVIDENCE.

Art. 1. *Con.*

11 Wheat. 392-413, U. States v. Amedy.

§ 6. Act of congress May 26, 1790. By this act *copies* of the legislative acts of the several States, authenticated by having the seal of the State affixed thereto, are conclusive evidence of such acts in the courts of the other States and of the Union. No other formality is required than the annexation of the seal; and in the absence of all contrary proof, it must be presumed to have been done by an officer having the custody thereof, and competent authority to do the act. Act March 26, 1804, as to crimes, ch. 393 [40] s. 2; the terms '*any person or persons*,' in the act as to destroying vessels, &c. extend to corporations and bodies politic, as well as to natural persons. On an indictment for destroying a vessel with intent to prejudice the underwriters, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers, *de facto*, the policy was executed, and to prejudice whom the vessel insured was destroyed, without proving the existence of a legal corporation authorized to insure, or a compliance on the part of such corporation with the terms of its charter, or the validity of the policy of insurance. See ch. 221, a. 6, s. 9. The deft. owned the vessel, hence the crime was in the prejudice to the underwriter. Hence it was argued for the prisoner that a valid policy ought to be proved, and real insurers, in order that he might intend to prejudice such underwriters. The court said 'the very producement of the policy, by the prisoner, to be executed by the company, was of itself *prima facie* evidence for such a purpose,' or intent to prejudice it.

2 N. H. Rep. 421.

The certificate of a justice that the creditor of a poor debt-

or had been duly notified of his intention to take the poor debtor's oath, is not conclusive evidence of the fact. III. Ch. 82. *Art.* 1. *Con.*

A notarial certificate is not evidence that a person was preparing to leave the country, nor is a certificate of a consul of the United States abroad, evidence a person was preparing to return: 2. A certificate stating a paper purporting to be a document from the treasury department of the United States to be a true copy, is not evidence without the official seal: but 3. In the State courts no other authentication of documents from a public office of the United States ought to be required than are required in the federal courts. 2 Litt. 330, Foster v. Davis.

Where the law requires a deed to be recorded, the proper officer's certificate, showing it is recorded, entitles it to be read without further proof of execution. 3 Litt. 12.

A copy of a deed recorded in a *late* district court certified, by the clerk of the superior court, was admitted in evidence, the clerk stating he was keeper of the records of the late district court. 2 Litt. 76

A certificate of a notary public, that a release was acknowledged by a party to be his free act and deed, is not receivable in evidence; but the notary's deposition, or some equivalent testimony ought to be produced to the court. 1 Rand. 456–459.

As to printed acts of a legislature, how evidence, &c. 3 Pick. 293, 297.

§ 1 *con.* And objections must be seasonably made, as where an office copy was produced in the inferior court, not under the seal of the office, and there not objected to, where the objection might have been easily obviated, therefore too late to object in the superior court. Art. 3. *Con.* 4 Har. & Mc H. 287–291.

So 9 Wheat. 483–488, Riggs *v.* Taylor, each party had the writing. Plt. was allowed to prove, by his affidavit, his part of the written agreement was not to be found, though often searched for; that his impression was, he tore it to pieces, thinking he had no further use for it. He gave notice to the other party to produce, at the trial, the counterpart. He said his also was lost. There seems to have been a copy taken. Parol evidence admitted of the contents. Rule stated: the original must be produced, if to be had; if not, the counterpart, if to be had; if not, then an attested copy, if to be had; if not, then a copy, if to be had; if not, then parol evidence of the contents. Where the writing has been voluntarily destroyed, for *fraudulent* purposes, or to create an excuse for not producing it, secondary evidence, as a counterpart copy, &c. is inadmissible. But where the destruction or loss, though voluntary, happens through mistake or accident, such evidence of the contents, &c. will be admitted. Cited

III. Ch. 82. Art. 3. Con.

2 Mc Nally on Evid. 344; 1 Phill. on Evid. 167. See also 9 Wheat. 558–565, the same principles.

9 Wheat. 581–598, the same principle as to *lost* writings and *secondary* evidence. Added, in this case of a *lost* note, not necessary that its contents be proved by a *notarial* copy. Enough it be the best evidence the party can produce; and to admit secondary evidence of a note lost, there need not be a special count in the declaration upon the lost note.

CHAPTER LXXXIII.

CONFESSIONS AND ADMISSIONS.

Art. 1. Con.

§ 2. In an action by a sheriff against his deputy, his admission he had received certain sums on executions, put into his hands, was admitted in evidence without producing the executions. 4 Har. & Mc H. 65–70.

Several connected, confession of one generally binds all. 4 Har. & Mc H. 346; 17 Mass. R. 227.

5 Pick. 391. p. 410.

The admissions of an administrator, a party in a suit, may be given in evidence by the other party. The debtor's confession may be given in evidence by the creditor to prove his

p. 414.

debt. See statute 1823, ch. 142. Partners are such on a note made by one of them in the name of the firm, his confession is not evidence.

1 Mc Cord, 324.

§ 7 *con.* The executrix of a deceased physician sued the master of a vessel, for medicine, &c. to the mate. The physician's books of original entries proved as usual, and the testimony of a witness who said he presented the bill to the master, who made no objection to it, but the witness could not positively assert that he promised to pay it, but his impression was he intended to pay it. Held, good evidence to render him liable, and not a case within the statute of frauds, for, said the court, the master, by the ancient marine law, when a seaman is sick or disabled, is bound to provide everything necessary for his recovery, and has a right to deduct the amount of expenses out of his wages.

1 Mc Cord, 449. p. 511.

Though the whole confession must be taken together, and not be mutilated, yet jury is not bound to believe the whole or any part of it. Several make a joint and several note, one acknowledges it is still due, this binds all and each one. Ante, art. 1, s. 1.

2 Greenl. 213–228, Pike v. Dyke.

Rule extends not to the transactions of *land proprietors*, at different adjournments of the same meeting. They cannot recall, at a second adjournment, a grant of land voted at the first adjournment of the same meeting.

Husband and wife are indicted for receiving stolen goods, her confessions, though criminating both, are admissible to prove her guilt, and the jury must take care that they do not operate to his prejudice. 5 Pick. 429.

§ 46. *Confessions and declarations, some late cases selected.* Declarations of one under whom the party claims, are evidence against him. 2 Serg. & R. 354. But not those of one made after he has parted with all his interest in the subject. p. 473, and 1 Serg. & R. 526.

In covenant on a lease, the lessor's declarations, in whose name the suit is, for the use of a third person, may be given in evidence by the lessee. 1 Serg. & R. 25.

§ 47. The validity of a will being in question, a witness testified to a confidential intercourse between himself and the testator, evidence was admitted of the testator's declarations, made to another witness, tending to prove the first witness could not have had such an intercourse. 4 Serg. & R. 208.

§ 48. The declarations of a party that he did not buy the lands in dispute, may be admitted against him, though not conclusive in equity. 5 Serg. & R. 257 and 295.

§ 49. The official acts and declarations of the trustees of a congregation, before and after the incorporation, are evidence against their constituents. But a corporation cannot be affected by the declarations of its members as to matters transacted at a corporate meeting. Magill *v.* Kauffman, 4 Serg. & R. 317–321.

§ 50. If A declared he was authorized by a power of attorney from the plt. to sell lands, this does not prove the power, but that ought to be produced, or its existence and loss proved; but if the plt. say he had empowered B, by letter of attorney, to sell lands, the plt's. declaration is admissible, if it tend to show a fraudulent concealment by the plt. of his title, whereby in equity he would be barred from recovering the land. Vanhorn *v.* Frick, 8 Serg. & R. 278.

§ 51. Power to sell given to three executors: one renounced, one articled to sell and convey and received all the purchase money. The vendee took possession. Evidence of prior and after declarations of the two acting executors, approving and ratifying the sale are admissible, and such testimony is admissible also against persons holding adversely to the vendors, but declarations made by the vendee in such case, on taking possession, cannot be admitted in his favor. 2 Serg. & R. 534, &c. Taylor *v.* Adams.

§ 52. A confession of one of the lessors of the plt. in ejectment, is evidence against all of them. Jackson *v.* Mc Vey, 18 Johns. R. 330.

§ 53. *Confessions of an executor, its effect.* *Assumpsit* for land sold and conveyed by the plt. to the testator, and money

III. Ch. 83. Art. 1. Con.

counts. Held, the executor's confession of a debt due from the testator is not admissible evidence in a suit for the debt against a co-executor to establish the original demand: but 2. Otherwise to take it out of the statute of limitations. The same as to a partner after a dissolution of the partnership. Hammon *v.* Huntly and two others, executors, 4 Cowen, 493—496. Cited 3 John. 536; 6 id. 269; 15 id. 4. If one executor confess a judgment it does not bind the others. Toll. 367.

CHAPTER LXXXIV.

CHARACTER IN ISSUE.

Art. 2. Con.

§ 8. 3 Pick. R. 194–197, Commonwealth *v.* Moore. In the case of bastardy, evidence the complainant was unchaste previous to her connexion with the respondent, is not admissible to impeach her credit as a witness.

§ 10. *Some late cases selected.* A person may testify as to the general character of a witness, from knowledge derived from common report only.

3 Serg. & R. 336.

§ 11. If the deft. is charged, incidentally, with a particular fraud, he cannot give evidence of his general character, and if such evidence be admitted, the error is not cured by the court's telling the jury, before the bill of exceptions is actually signed, they must disregard it.

5 Serg. & R. 352.

Fowler and others *v.* the Ætna Fire Ins. Co., 6 Cowen, 675–677.

§ 12. *Assumpsit* on a policy of insurance against fire. Held, in general when a party is charged with a specific fraud in a civil action, his character is not in issue. The evidence of fraud cannot be replied to by proving his general good character for honesty. Such policy fails if the description of the property insured is not exact. As where it was stated the stock in trade of the insured was contained in a two story frame house *filled in with brick.* No. 152 Chatham street: the house No. 152, being a frame house, *not filled in with brick.* Held, that the policy was void; the description of the house in this case as of a vessel, is a warranty the description is true. Court cited Ruan *v.* Perry, 3 Caines, 120; 2 Bos. & P. 532, note as to character; as to description, 3 Burr. 1909; 2 H. Bl. 574; Phil. on Ins. 125: 8 John. 237–319; 20 id. 198; 1 Marsh on Ins. 335; 4 Mass. R. 337.

CHAPTER LXXXV.

DAMAGES, PROPER EVIDENCE, TO INCREASE OR MITIGATE, &c.

§ 4. In an action of defamation, evidence to prove the plt's. *general* bad character is admissible in *mitigation of damages*. So facts and circumstances showing a ground of suspicion, though not conclusive of actual guilt, may be admitted in evidence in *mitigation of damages*. 1 Nott. & McCord, 268–278, Buford *v.* McLung.

So in an action of *crim. con.* the misconduct and adultery of the wife before seduced by the deft. may be proved in *mitigation of damages*, and by the man who had the previous criminal connexion with her, if he be willing to testify. 2 Nott & McCord, 267-272.

CHAPTER LXXXVI.

DEEDS AND SEALED INSTRUMENTS.

§ 8 *con.* It is a general rule that the evidence of a subscribing witness to an instrument is the best, and if to be had, must be produced, and if not, proof of his handwriting is required: 2. If he merely make his mark or if he is dead, proof of handwriting of the party executing the instrument is proper; so if he be blind, or insane, or infamous, or interested since the execution of the deed, or beyond the reach of the court's process, or not to be found after diligent inquiry, the course is to prove the handwriting of the attesting witness; but if he only makes his mark, there is no handwriting. See 5 Serg. & R. 314; 2 do 44, 349; 3 do 202. Art. 1. *Con.* 4 Rand 325–329.

The words—'I quit my title,' used in a deed of land, are sufficient to pass my estate in it. 2 N. H. Rep. 202.

On proving the handwriting of the party, a jury may presume a sealing and delivery of the deed. 1 Serg. & R. 72. A deed is good without subscribing witnesses. It is the *sealing and delivery*, in fact, that constitute the instrument a deed or specialty. 2 Serg. & R. 504, Taylor & al. *v.* Glaser.

Recording a deed between third persons, is no notice to a purchaser at a sheriff's sale, who does not claim through or under it. 5 Serg. & R. 246.

It is now settled that where a party to a suit, pursuant to notice, produces an instrument to which he is a party, or under which he claims an interest, not necessary the opposite party, stranger or a party to the instrument, call the subscribing witness to prove the execution of it: 2. But in all other cases its execution must be regularly proved by the party using it in evi-

III. Ch. 83. *Art.* 1. *Con.*

dence: 3. If the names of the subscribing witnesses be torn off, still the party so using it, must prove the handwriting of the signer, and this he may do, there being no proof the party producing it in evidence has mutilated it. When the form of the action gives the deft. notice to be prepared to produce an instrument, if necessary, to falsify the plt's. evidence, the plt. need not give the deft. notice to produce it: 4. Where the declaration contains only the general counts on *implied* promises, (no writing,) the deft. has no right to an order on the plt. to produce letters or papers in his possession, or to give copies of them.

Jackson v. Kingsley, 17 Johns. R. 158. p. 293.

Willis v. Barclay, 19 Johns. R. 268.

§ 14. Further cases—1 Greenl. 57–61; 12 Mod. 607; 7 D. & E. 266.

§ 22. A & B keep their papers in the same chest. A keeps the key; he makes a deed to B, and it is put into this chest. There is no delivery. 3 Greenl. 141–147, Chadwick & al. *v.* Webber & al.

§ 23. *How a void deed may prove extent of possession.* As where one is void on the face of it; but is recorded and the grantee enters under it on a part of the land claiming the whole; and continues openly to possess and improve. This deed is admissible as evidence of the extent of his claim: 2. If a person on land act as the owner of it, and claims *adversely* title to it, this being unknown to the true owner, amounts only to successive trespasses: but, 3. When known to, and acquiesced in, by such owner, the wrongdoer's conduct and claim become a disseisin. The usual multitude of cases on this subject of disseisins in new countries, are cited.

3 Greenl. 816–826, Robinson *v.* Swett & al.

§ 24. Parol evidence is admissible to show the consideration expressed in a deed to have been received by the grantor, was not, in fact, received by him. *Superfluous* words in the description of land in a deed, may be rejected, as if a soldier, in describing his military bounty lot, say he was a soldier in A's regiment, when in fact he was in B's, the words as to A's regiment may be rejected, as *surplusage*. Jackson *v.* Root, 18 Johns. R. 60. So if lot No. 51 be mistaken for 50—do. 81; do. 107; 19 do. 449.

Brown v. Bell, 20 Johns. R. 339.

§ 25. A gives a mortgage; deed not recorded, and afterwards gives an absolute deed to B of the same land, a *bona fide* purchaser for a valuable consideration, and without notice. B's title is preferred to the mortgage, though that be afterwards recorded, and before the deed to B. But, 2. Under the 4th section of the act as to deeds, (Sess. 36, ch. 97,) the deed first recorded is preferred; the act declaring deeds not recorded in the proper counties fraudulent and void, as against a *bona fide* purchaser or mortgagee for a valuable consideration, unless first recorded, &c. id.

Jackson v. Campbell, 19 Johns. R. 281.

§ 26. *Acceptance of a deed.* This is essential, though it is

presumed the grantee is willing to accept a deed from its beneficial nature; the presumption, however, is slight where the grantee receives no benefit under it, but is subject to a duty as a trustee is, who is to perform a duty and trust. Jackson *v.* Bodle, 20 Johns. R. 184. III. Ch. 86. *Art.* 2. *Con.*

§ 27. *Who may avoid a deed.* No one but a party to it, who alleges a fraud to have been practised upon him or those claiming title under him, is allowed to impeach the deed, on the ground of such fraud. Jackson *v.* Eaton, 20 Johns. R. 478.

§ 28. Any alteration of a deed or writing made by the party claiming under it, avoids it; though the alteration is immaterial only. 1 Haws, 222.

§ 8 *con.* 2 N. H. Rep. 543–546, Bowers *v.* Jewett. The court decided what alterations in writings are material. And immaterial alterations do not vitiate them; but a note dated a wrong day and altered to the true day is void, as the alteration is material unless promissor consent. Art. 3. *Con.*

Where an alteration in a deed, &c. by a *stranger*, does not avoid it; that is if the original remain legible. 6 East, 309–312, Henfree *v.* Bromly; see ch. 40, a. 15, s. 7; 6 East, 86; 1 Gal. 69; 1 N. H. Rep. 100.

Land by deed was conveyed to A; and he entered and fraudulently altered his deed from four hundred acres to five hundred. A died, and his administrator sold to Thorndike, an innocent purchaser. Held, his title was good. Verdict for the plt. set aside, &c. Also held, If a grantee voluntarily destroy his title deed, or fraudulently make an immaterial alteration in it, his title to the land is not thereby impaired. See the cases of Pigot, of Smith *v.* Crocker; of Hunt *v.* Adams; of Hatch *v.* Hatch; of Markham *v*, Gonaston; of Reed *v.* Brookman, &c. &c. in other chapters. 1 Greenl. 73–79, Barrett *v.* Thorndike.

Writ of Entry. Held, a material alteration of a deed of land while in possession of the grantee, is, *prima facie*, fraudulent, and is presumed to be made by the grantee himself: 2. Neither he, nor one claiming under him, with notice of the alteration, and without having paid an adequate consideration for the land, can use the deed in evidence: 3. Nor can the want of it be supplied by them, by parol testimony, from 5 to 15 acres. 1 N. H. Rep. 145–150, Chesly *v.* Frost.

§ 14. Error to the Circuit Court of Ohio. A voluntary deed is void as to *antecedent*, but not as to *subsequent* creditors: 2. If such a deed be impeached as fraudulent, evidence of judgments against the grantor is admissible as proof, (among other facts,) that he was indebted when he made it, though the grantee was not a party to the actions in which the judgments were obtained: 3. To repel the presumption of fraud, evidence is admissible to prove the grantor's good estate, and that the grantee was a creditor of the grantor when he gave the deed, though the consideration in it purported to be pure love and af- 11 Wheat, 199 Hind's lessee *v.* Longworth.

III. Ch. 86. Art. 3. Con.

fection, also to prove the grantor had estate sufficient left to pay his debts, &c. : 4. Evidence is admissible to show another consideration, than that expressed in the deed, if not inconsistent with the consideration expressed : But 5. Parol evidence is not admissible, substantially to vary a written agreement : But 6. If one party attempt to prove facts, *dehors* the deed, to invalidate it, the other may prove facts to rebut them and not vary the deed.

Pinny v. Corwithe, 18 Johns 499. 15 Johns. R. 283.

A *rasure* in a deed, if done with consent of parties, does not invalidate it ; and the fact of the erasure may be proved by any person, though there be a subscribing witness to the deed. But a deed or will is void, if an alteration, material or not, be made by a person claiming under it.

1 Cowen, 622-645.

If B, a party to the execution on a judgment that has been paid, but on which no satisfaction has been entered of record, nor the execution returned satisfied, purchase the estate sold under it, he is not protected, as he is chargeable with notice ; so if D afterwards purchase of B, with notice the person, whose property was sold, claims it, and D takes indemnity from B, he will not be deemed a *bona fide* purchaser : 2. One to be a *bona fide* purchaser must not only have a conveyance in form good, but he must shew actual payment of the consideration : 3. That one is a *bona fide* purchaser is a defence, generally, confined to a court of equity : 4. It is used to defend one's possession, but is not a ground for relief : 5. Knowledge that another has claim to land is sufficient to excite inquiry in the party, so to charge him with presumptive notice ; which is, where the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him : 6. A conveyance to defraud creditors is valid between the grantor and the grantee, though void as to creditors who have judgment in full force : 7. If the judgment be paid a sale under it, and the plt. purchases, his purchase itself is a fraud and void : 8. A *bona fide* purchaser, at a sheriff's sale, on execution only voidable, acquires a good title ; very numerous authorities are cited in this case, American and English, ancient and modern. See also covenant to stand seized, ch. 114, a. 9.

Art. 4. Con.

1 Rand. 219-242, Harvey v. Alexander & al.

§ 8 *con.* When a deed is made in consideration 'of natural love and affection,' and the further consideration of 'one dollar,' parol proof may be admitted of *other valuable considerations :* 2. If a wife part with her right of dower, this is a good consideration for an after deed, conveying *other* property for her benefit : 3. Though *personal* property, acquired by marriage, is not *a valuable* consideration to support such a deed, yet it is a *meritorious* consideration, and the deed is valid or not, according to circumstances : 4. How a deed must be proved and recorded. If dated on one day, and delivered on an after day, the day of the

delivery must appear, or the record when to be recorded in a certain time, as eight months after the delivery. Harvey was a *creditor*, and the case was in chancery. Decree below affirmed as to one deed, and reversed as to the other, because not timely recorded. III. Ch. 86. *Art.* 4. *Con.*

General rule, *parol* evidence cannot be admitted to contradict, explain, or alter a written agreement, but may be received to prove fraud, mistake, or surprise, in the execution of it; but in the latter case the evidence must be strong and clear. 4 Rand. 51–58.

The parties by deed, fix a water course, afterwards, by parol, they agree to alter the course of it, and *execute their parol agreement:* this may be proved by parol. 4 Serg. & R. 241.

§ 25 *con.* A state case. *Assumpsit* on a note. Held, 1. Parol evidence it was given on condition that the principal should not be called for so long as the interest should be punctually paid, was inadmissible: 2. Such note is valid, given on the promissor's voluntary subscription to increase the parish fund, and given to trustees. 5 Pick. 506—509, Pembroke Precinct v. Stetson.

§ 36. The grantee lodged his deed with the clerk of the court, *to be recorded*, who made a minute in his docket that it was acknowledged and received *to be recorded by him;* and before the same was recorded it was lost. After purchasers for valuable consideration had information it was so lodged and lost, allowed to prove the contents of it, and good as against them. Court of chancery decided otherwise. So if lost, a copy may be read, on the party's oath that he had searched the clerk's office, and all other places where he supposed the original deed might probably be found, and could not find it: see also ch. 164, s. 5, Reed *v.* Brockman, and other cases, ch. 144, a. 14, s. 20, ch. 82, a. 3, &c. 1 Rand. 102—107. 2 Rand. 539—548.

§ 2 *con.* Where the subscribing witness to a bond is dead, or out of the State, the next best evidence to prove the execution of the bond is the proof of the handwriting of the obligor, and, also, that of the witness. So 2 M'Cord, 531, where a deed twentysix years old was held enough to prove the handwriting of the grantor, and one of the subscribing witnesses under the circumstances. (No doubt possession was according to the deed.) *Art.* 5. *Con.* 2 M'Cord, 188.

CHAPTER LXXXVII.

DEPOSITION, &c.

§ 2. Evidence taken *de bene esse* on a commission, may be read on affidavit that the witness is unable to attend by reason of indisposition. Sims *v.* Sims, 1 Const. Rep. 131. Art. 2. *Con.*

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An affidavit for a commission is sufficient, if it show the witness is material, as advised, &c., and not within the jurisdiction of the court; so the affidavit of an agent or attorney is sufficient. 1 Cowen, 209. p. 210.

§ 4 *con.* A deposition taken *in perpetuam*, &c., cannot be used in the trial of an action commenced before it is taken. The deposition pending the action, must be taken in the case on the first section of the act.

Nor can a deposition *in perpetuam*, &c., not recorded pursuant to the act, of one deceased since, be used as hearsay evidence to prove the facts stated in it.

7 Wheat. 455-470. Where a deposition has once been read in evidence without opposition, it cannot be afterwards objected to as being irregularly taken.

2 Litt. 249, 250. In an action against partners, notice for taking deposition given to one of them, in Kentucky, the other residing out of the State, is sufficient, though the partnership be dissolved before the trial: 2. A deposition *de bene esse*, cannot be read till it is shown that the witness's attendance cannot be procured at the trial.

3 Litt. 77. Objections to interragatories, as being leading ones, may be made when the deposition is offered to be read in court, where

1 Tenn. Rep. 107. taken before commissioners. Commissioners may issue to take depositions, without applying to the court at any time before the cause is set for hearing.

1 Pick. R. 389. § 21. If both parties take their depositions off the files of the court contrary to the rules of it, and the plt. reads his, he admits the deft. to read his.

Art. 4. *Con.*

§ 23. *In perpetuam* in New York. Affidavit on which is founded an order for the examination of a witness *de bene esse*,

1 Cowen, 586-588, Jackson v. Hooker. pursuant to the act (Sess. 36, ch. 31,) to perpetuate the testimony of witnesses in certain cases: order of notice thereon, &c., &c., the forms.

CHAPTER LXXXVIII.

HANDWRITING.

Art. 1. *Con.*

§ 3 *con.* It is sufficient proof of the deft's. signature, if a witness swear he has seen the deft. write, and believes it to be his handwriting. Debt on a bond; plea *non est factum*. 1 Nott & M'Cord, 554–556.

M'Cord, 74. If the subscribing witnesses to a will be dead, their signatures may be proved, to establish the will.

And 2 Greenl. 33–37, Hammond's case. A witness may testify to his belief of the genuineness of handwriting from his

acquaintance with the party's handwriting, whether this acquaintance were gained by having seen the person write, or having received letters from him, or, at any time, having seen writing either acknowledged or proved to be his; and there is no distinction between civil and criminal cases in applying the rule. The question was, if the prisoner forged a check. The witness in the case, saw other checks the prisoner acknowledged were his handwriting, but they were gone. The witness was admitted to testify to the *similitude* between those so acknowledged, and the one alleged to be forged by the prisoner: see a. 2, s. 17, cases; similar principle Johnson *v.* Daverne, 19 Johns. R. 134.

Where an attorney or counsel, after the suit is commenced, and without any communication with his client, acquires a knowledge of his handwriting, he is a witness to prove it. 19 Johns. R. 134.

Where a subscribing witness to a bond, swears he signed as a witness, but that he did not see the obligor sign or deliver it, evidence is admissible to prove his handwriting. If the handwriting of the witness cannot be proved, then proof of the handwriting of the obligor may be admitted; Halloway *v.* Lawrence; and Jones *v.* Blunt, 1 Hayw. 238; 2 do. 404; 1 Tenn. R. 437; if there be two subscribing witnesses to a note; not sufficient to prove the handwriting and death of one, the other must be produced, or his absence accounted for. If one witness to a deed be dead, and the other in a foreign country, to prove the handwriting of the one deceased is sufficient. 1 Ruffin, 49. Stump *v.* Hughes, 5 Hayw. 96.

Comparison of hands is admissible as a circumstance in aid of doubtful proof; but *per se*, and without other proof, it is inadmissible. 2 M'Cord, 260. 2 M'Cord, 518.

§ 17 *con.* Ejectment. Several subscribing witnesses to a bond or power of attorney. It is not enough to prove one of them is dead or out of the jurisdiction of the court, and then prove his handwriting with that of the party, but the absence of all must be accounted for, as that they are dead or out of the jurisdiction of the court, or on diligent inquiry cannot be found. Sundry cases cited of proof of handwriting. The court inclined to think a boundary may be fixed by a *parol* submission, and a *parol* award. As to handwriting see also 5 Binn. 340. Art. 2. Con. Jackson *v.* Gager, 5 Cowen, 383—388.

CHAPTER LXXXIX.

HEARSAY AND REPUTATION.

§ 2 *con.* 4 Rand. 611–659, Gregory *v.* Baugh. In this case, of forty-eight pages, there is much law and learning respecting hearsay and reputation, as to pedigree; the nature and

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principles thereof: matters of general history must be given in evidence, as well as other facts; and the jury are not to be left to their own information as to such things; including a review of all the laws as to Indian slavery in Virginia. Inquisitions of freedom: evidence that there was a belief in the neighbourhood, some fifty or sixty years before, that the plt's. female ancestor was entitled to her freedom, is not admissible; by two judges against one. Baugh, a man of color sued for his freedom: verdict and judgment for him in the superior court; on pleadings in common form, two bills of exception filed, and an appeal. Baugh was a descendant from Sibyl, who about the year 1770, was a mother, and appeared to be part Indian and part negro, and the curious question was, whether her father or her mother was Indian: if mother, Sibyl was free, if father, she was a slave, and so the plt. The instruction of the superior court was thus: that it was lawful for the jury to consider facts *connected with the history of the country, as if formally proved to them, and if, at the time spoken of, it was much more common for female Indians to be captured and domesticated among us than males, that circumstance might* be regarded by them as of some weight, and in the case before them, they should attentively consider all the circumstances, and find for the plt., if they believed Sibyl's mother was an Indian woman: otherwise, they should find for the deft. To this, the deft., Gregory, excepted; as also, to said belief, &c., said history, &c. Cited 2 Hen. & M. 193; 7 Cranch, 290: Lord Kenyon's opinion in Rex *v.* Eriswell, 3 D. & E. 707; 1 East, 373; 3 East, 54; 13 Ves. 140, Vowles *v.* Young; and 511, Whitelocke *v.* Baker; 1 Wheat. 6; Salk. 281; Virginia statutes 1682, 1691; so of 1655, 1657, 1661, 1670, 1676, 1679, 1682, 1691, 1705, 1717, 1723, 1753, 1765, 1778, 1785: no edition of the laws was published in Virginia till 1733: 'Hening's statutes at large:' an *abridgment* was published by Beverly, 1722: there was no collection of them until 1686, and that was in London; so that up to 1684, the laws were promulgated in Virginia by manuscript copies, read to the people at courts, and a copy deposited in the clerk's office. See ch. 223, a. 11, s. 39, the true construction of the important statute of 1691, and many other matters as to slavery in said section 39, and more at large in said article 12. On the whole, the decision in this case is doubtful, especially on the point of *hearsay* evidence.

Hearsay in the family, and among relations, tradition, and anything which shows a general reputation, is admissible to establish a pedigree. 5 Cowen, 237–243; and 1 Hawks, 442.

§ 20 *con.* Hearsay evidence is not admissible to prove a person was warned to leave a town pursuant to the statute 4, W. & M. ch. 13; 1 Pick. R. 245–247.

2 Barn. & Cres. 605, Held, *dying declarations* are admissible only where *death* is the subject of the charge, and the circumstances of the *death* the subject of the declaration. Therefore, where the deft was convicted of perjury, a rule *nisi* for a new trial was obtained: whilst that was pending, the deft. shot the prosecutor, and on showing cause against the rule, an affidavit was tendered of the *dying declaration* of the prosecutor, as to the transaction out of which the prosecution, for perjury, arose. Held, it could not be read. Cited 4 B. & A. 53; 12 St. Tr. 949; 1 Strang. 499; 1 East. P. C. 354; 3 Burr. 1244; 6 East. 195.

It is a rule of law, that what a witness has sworn on a former trial between the same parties, and in the same cause of actions may, in case of his death, be given in evidence. 2 Serg. & R. 84; 4 Serg. & R. 205. So if the witness be out of the State. 4 Serg. & R. 319. But notes taken at the trial, of such testimony, by a counsel, and sworn to by him, stating he believed he took correctly, but that he has no other recollection of what the witness said than from his notes, are not evidence of the testimony of the witness. 4 Serg. & R. 203; 2 N. H. Rep. 127—303.

§ 4 *con.* The principles of this case seem to have been adopted in Maryland, from the first settlement of the State. 1 Har. & M'H. 21, A. D. 1704–1735, p. 84, p. 355, Chamberlaine *v.* Crawford; 534, Long *v.* Pellets. Another good general rule, that is, in the construction of deeds, a special description by course and distance, is preferred to a general one by the name of the land: p. 523 to 531, A. D. 1774, Hawkins *v.* Hanson, one name was Martin's Triangle, also hearsay evidence, p. 368; 1 Har. & M'H. 179, 209—230; other cases, 2 Har. & M'H, 416; 3 do. 437; 4 do. 398, 508–536.

To prove *boundaries*, a plot returned in an ancient ejectment, is admissible in evidence, on the same principle hearsay evidence is. 4 Har. & M'H. 126—135.

If a tract of land be granted to A, both by *courses and distances*, and *bounds*, and A sells by the courses and distances only, to B, and not by bounds, B shall have the whole tract by the bounds, and not be confined to the courses and distances. 4 Har. & M'H. 508—512, Norris' lessee *v.* Potter. Bounds and marks preferred to course and distance. 2 Nott. & M' Cord, 99—109; see 4 Pick. 277—282. Where number of acres is merely the officer's mistake.

§ 8 *con.* A long letter from Dr Erving, dated Philadelphia May 29, 1785, shows how uncertain the variation of the needle is; published, 1 Har. & M'H. 569--570; and the plt. in ejectment must run his lines as the needle pointed when first

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laid out for him. 3 Har. & M'H. 430; several points; 4 Har. & M'H. 398—404.

17 Mass. R. 413–417, Parker & al. *v.* Smith & al.

Trespass on the case for obstructing a way, &c. Held, if land be conveyed as bounded one way, one side, this is an implied covenant there is such a way, whether above or below low water mark. If a way in fact not extending the whole line of the land granted, the parties are supposed to have referred to such way as a boundary as far as it extends.

1 Rand. 403—408, Stuart *v.* Luddington.

§ 9. A dispute arises as to the bounds of land between A and B, B yields his opinion and admits A is right. B is not bound, if afterwards he find he was mistaken, unless his acknowledgment was founded on some consideration. There

Same p. 417.

was no consideration and no contract. Where land is conveyed, bounded by a water course not navigable, such conveyance carries with it the title to a moiety of the bed of the watercourse. The words in the deed were, '*bounded by the river*, and such is the construction, though the grantor own both sides of the river. 3 Rand. 33—40.

2 Greenl. 322--334. Where part of the description is false. See ch. 112, a. 5, s. 5; 3 Greenl. 71--73. The line of a farm more certain than point of compass. 126—131; 3 Greenl. 393--398, Keith *v.* Reynolds; a similar principle.

§ 10. The question of boundary is one of fact, or of law and fact combined, and proper only for the decision of a jury. Den *v.* Morrison, 2 Murph. 551; Den *v.* Greeler, 556.

5 Pick. 170. Land is attached under one description and levied on under another; parol evidence is admissible, on a question of title, to show both descriptions refer to the same land.

See Ch. 94, a. 3, s. 2. 1 Greenl. 219—226, Kennebec Proprietors *v.* Tiffany.

A plan, referred to in a deed, is a part of it, and to be construed as if all inserted in it: 2. When a deed refers to a monument, as erecting, but in fact immediately *afterwards* erected by the parties, intending to conform to the deed, this is the boundary, though not entirely coinciding with the deed, *aliter* if erected for any *other* purpose. See a. 3, s. 4. So whether the plan is on record or not. 2 Greenl. 149—156, Kennebec Proprietors *v.* Lowell. They and Massachusetts are bound by Ballard's line, run in 1795, and all claiming under them. Similar principle, 2 Greenl. 213--217; 3 Greenl. 110--119. A grant of land extending '*the space of fifteen miles on each side of Kennebec River*,' means every point in the exterior line shall be exactly 15 miles from the nearest point of the river.

12 Wheat. 570. What a sufficient description of land in a trustee's notice to sell.

As *to quantity of land.* The rule in equity, that where land is sold for a certain quantity, a court of equity relieves if

the quantity be defective, only applies to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendee. 12 Wheat. 574--581, Dunlap & al. appellants *v.* Dunlap, &c.

Action of ejectment. Held, if in the description of parcels, in a conveyance of land by boundaries, or number of the lot, or other certain designation, the quantity be mentioned in addition, without any express covenant that the land contains that quantity, the whole is considered as mere description, and the quantity being the least certain part, must yield to boundaries, or the number of the lot, or other more certain description. Repeated rules and principles before stated. 6 Cowen, 706--727, Jackson *v.* Moore.

§ 28 *con.* An award may fix, conclusively, a boundary line, and where the submission is at common law. Davis *v.* Havard, 15 Serg. & R. 165.

§ 33. Hearsay, &c. Additional evidence, by common reputation, admitted to prove two persons to be brothers of the whole blood. 1 Har. & M'H. 281--297. But excluded if it appears better evidence may be had. Id. p. 368—370, April 1770, conversation of two persons deceased, admitted in evidence to prove a line run by a *monument*, though if run *by course and distance*, would have affected them when they conversed, &c. See p. 531. Hearsay evidence admitted to prove what the plt's. ancestor, then seised, said 50 years before the trial, as to the bounds of the lands. Howell *v.* Tilden, p. 84, and see p. 368; same principle, 4 Har. & M'H. 156-159, 398.

§ 34. The original depositions of persons deceased, taken under a land commission, defectively executed, read in ejectment, as the declarations or hearsay of persons deceased. The commission issued on an act passed in 1786, 'for the marking and bounding lands,' to five commissioners duly sworn from the county court, and executed and returned to it; both parties were before the commissioners. 4 Har. & M'H. 156—159, Weem's lessee *v.* Disney. A *certiorari* does not lie to remove proceedings under such commission. Vol. 3, 122. They must show how they give notice. Har. & M'H. 156.

§ 35. Ancient reputation and possession as to boundaries of streets in a town, are entitled to more respect, in deciding on the boundaries of lots, than any experimental survey that may afterwards be made. 3 Rand. 44--49.

§ 36. True boundary between the United States and Florida. 12 Wheat, 523—529, Harcourt *v.* Gaillard; and 529--545, Henderson plt. in error *v.* Poindexter's lessee.

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Con.

CHAPTER XC.

INTEREST IN WITNESSES.

2 Nott. & M' Cord, 153–156. § 2 *con.* A sold a horse to B, and B sold him to C; C sued B as to the soundness of the horse. Held, A is a competent witness, though the law, (civil law) implies a warranty of soundness, in all sales where a sound price is given. In this respect, S. Carolina adopts the *civil* law.

1 M'Cord, 285. It is settled, a witness is competent, except 1, where he has a direct interest in the event of the cause: 2. Where the judgment can be given in evidence for or against him in another cause: 3. Where it has been settled from motives of policy or expediency, that he ought not to be permitted to give evidence. The same interest which will exclude the husband, will exclude the wife, but it is too general to say the wife can, in no instance, be a witness where he is incompetent. A conviction of perjury or felony, will render him incompetent, but his conviction will not affect her competency. A prisoner was indicted for murder, with his son. The father was charged with having given the mortal wound, and the son with having been present, aiding and assisting. They were tried separately; the father was tried first, and on his trial, Held, the son's wife was a competent witness; for both being charged as principals, one may be tried and convicted, and the other acquitted. Hence her testimony for or against the father, could not affect her husband. Other cases of interest. 2 Bay, 7, 93, 177, 448, 463.

2 Rand, 87–92. § 8 *con.* A witness is competent, if the record in the suit in which he testifies, cannot be given in evidence for or against him, in any future suit to which he may be a party: 2. The interest of a witness may be released by the party requiring his testimony, and his competency restored.

So long as a person is liable for any costs in an action, he is not a witness, though he release every other kind of interest; as *assumpsit* on a policy of insurance on goods, the plts. averred it was effected in their names as agents, and that A, B, C, and D, were interested in the goods, to the full amount insured; and that the policy was effected on their account, and for their sole use and benefit. The plts. called A as a witness; being objected to, they gave in evidence a deed poll he executed before the commencement of the action, whereby he released to the plts. all actions he might have by reason of the policy, or for any monies to be recovered by them from the underwriters. The plts. also gave in evidence an indenture executed by A, after the action was commenced,

whereby, after reciting the plts. had effected the policy, that A, B, C, and D, were the persons interested; that actions had been commenced in the names of the plts., and that they being desirous of indemnity against the costs, the court of Common Pleas had ordered A, B, C, and D, to indemnify, and that L and R had agreed to do it. A, B, C, and D, in consideration thereof and of 10*s.* assigned to L and R, all their interests in the policy, and all benefit to be derived therefrom, and all monies to be recovered in the said actions, to and for their own exclusive use and benefit. Held, that A was still liable in all events to the attorney employed to bring the action, and so incompetent. It seems the assignment to L and R, was illegal as maintenance. 5 Barn. & Cres. 188–195, Bell *v.* Smith and others, in error. A was admitted in the Common Pleas.

§ 16 *con.* If the plt. recover the thing in dispute, the debt the proposed witness owes him will be lessened, and if the plt. do not prevail, the witness will have the value of the thing in money, he is admissible as a witness for the plt. He stands indifferent, though he may have a preference to one of the parties, which goes to his credit. 17 Mass. R. 197—207, Rice *v.* Austin.

The principal obligor in a bond, cannot be a witness for his surety, jointly bound with him, as the surety would have recourse against the principal for the whole recovered against him, including all subsequent costs expended by him. Here, again, the witness is excluded on account of a *future* action, for if he, by being a witness, could make his surety prevail, he would exempt himself from the surety's future action. 4 Rand. 286—291.

7 Wheat. 425. In Evans *v.* Eaton—'It is perfectly clear, that a person having only an interest in the question, and not in the event of the suit, is a competent witness; and in general, the liability of the witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence, for or against him, is an interest in the question, and does not exclude him.'

7 Wheat. 453—470, Evans *v.* Hettich. A person is a competent witness in a patent cause, though sued in another action for an infringement of the same patent.

An important and correct principle. Though a verdict may not affect the person offered as witness in another action, yet if the verdict may create a new responsibility the law will notice and enforce, for or against this person, or increase or decrease an existing liability, he is not admissible. 5 Serg. & R. 371. A witness is competent if he have only a *possible* interest in the event of the suit. 3 Serg. & R. 132 & 130.

III. Ch. 90. *Art.* 1. *Con.*

He is competent if not interested, though he thinks he is, and 4 Serg. & R. 226.

So if A called as a witness, is by his testimony, to cause a right of a *future* action against him to cease, he is excluded, as Smith *v.* Bradstreet, 5 Cowen, 213—216. A statute in New York, provides when two men, &c. own land undivided, and apply to a court for a division, the court appoints commissioners to divide, and subjects them to advance their own money to pay flagmen. In this case A & B were commissioners, and a certain sum, say $10, was the right of the flagmen; hence it belonged to A & B, to advance $5 each, but A advanced the $10, so B became liable in a *future* action to contribute and pay to A, $5. A sued the owners for his services and the $10; called B as witness, to support the action; the court rejected B, as one interested in *the event of the suit*, as the court expressed it, and as it is often expressed. But how interested *in the event of the suit?*—clearly not, but in getting rid of A's right of *future* action against B, the proposed witness, to recover the said $5; for if A recovered of the owner the $10, B could not be liable for part of it, and if A lost his action and paid costs, B could not be held to pay any part of them. But when A should recover the $10 of the owners, B would cease to be liable to pay the $5, so get rid of a *future* action therefor. This case, like others of the kind, deserves particular notice, because the court and counsel invariably spoke, as is thousands of times done, of B's being interested *in the event of A's suit* against the owners, including in the words *in the event of the suit*, such liability to a *future* action. Now what is this ceasing to be so liable, but the *consequence* of A's action, his recovery of the $10 of the owners, and such ceasing to be liable on acquiring a right of future action, may be a motive in the mind of the witness, *less* or *greater*, *more* or *less* remote, as such consequence, which, after all, leaves to the court's discretion so much, that the general rule is often but little more than something to talk about. In this case, A. Burr, cited many cases, and the court cited Emerson *v.* Andrew, Marquand *v.* Webb, 16 John. 92; Gage *v.* Stewart, id. 293; Butler *v.* Warren, 14 id. 57.

Jackson *v.* Nelson, 6 Cowen, 248—249.

§ 17. Ejectment by the heirs, against a devisee and codevisee, and tenant in common with the deft., not in actual possession, may be a witness for the deft., especially if he say on the *voire dire*, he does not know he is interested. See the end of this article.

Added to s. 22, 4 Har. & M' H. 392—393. 1 Litt. 107.

§ 35. If, after the fact a witness is called to prove, he, by his own act, becomes interested, without the interference of the party calling him, he is still competent. A deft. whose

p. 110.

property has been sold on execution, is a competent witness to prove the extent of his title to the property, in a suit between a purchaser at such sale and a person claiming the same property by a title adverse to that of the witness. 1 Litt. 221. When a party calls a witness, interested in the cause, and insists on his being sworn, he cannot object to any part of his testimony as incompetent, though directly in support of the witness's own interest. III. Ch. 90. Art. 1. Con.

§ 1 *con.* But in *Maryland* this distinction was made, to wit: if a witness is sworn on the *voire dire*, and thinks he is interested, though not so, he cannot be sworn generally; but where evidence is offered to the court to prove he is interested, and it appears he is not, though he thinks he is, he is sworn generally; for in the last case the court is to decide if interested or not. Art. 2. Con. 4 Har. & Mc H. 342, 343, Peter v. Beall.

An agent to sell property is a competent witness for his principal, though he may have a lien on the property; so though his testimony may tend to discharge himself. 2 N. H. Rep. 79. p. 554.

§ 6. If A buy land in his own name, he may be admitted to prove he purchased as agent and trustee for B, to whom he (A) afterwards conveyed the lands. Brown *v.* Downing, 4 Serg. & R. 497.

§ 2. 11 Wheat. 280–303. An attorney is not a competent witness as to facts communicated by his client, &c. but may be examined as to the mere fact of the existence of a relation between counsel, &c. and client. Art. 3. Con.

And 2 Barn. & Cres. 745, a communication made by a client to his *attorney*, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in the cause. P. 800, a bill in equity dismissed with costs: the plt. brought an action for the same cause and got a verdict. Held, the costs in equity might be set off against the judgment, *but subject to the attorney's lien.*

§ 3 *con.* Trespass for breaking the plt's. close and digging the clams there growing. Held, an inhabitant of the town could not be a witness either at common law or by said statute of February 13, 1793, to prove a custom for the inhabitants to dig clams in a particular spot. By that act an inhabitant is rendered competent only in cases in which the town in its *corporate* capacity is a party or interested in the suit, and here the *town* of Gloucester was not interested in the event of the suit as a town. No *corporate* property or right was in question. Art. 4. Con. Luskin v. Haskell, 2 Pick. 357–360.

§ 10. 1 N. H. Rep. 273–279, Eustis *v.* Parker, was the case of the will of Edward Sprague, minister in the town of

III. Ch. 90. Art. 4. Con.

Dublin, who, December 18, 1817, by his will, gave a large sum to said town for the support of a minister, &c., and a large real estate to the town for the use of schools. The subscribing witnesses were, when they signed, and remained, inhabitants of said town, and yearly taxed in that town for the support of schools. Held, they were credible witnesses within the meaning of the statute of February 3, 1789, s. 1. Held, the town was a *public* corporation, and that it had been the practice of the State, to admit such witnesses in such cases, in which corporation property no member had a direct private interest he could dispose of, &c. otherwise in *private* corporations. Ch. 68, a. 2, s. 5; 11 John. 76; 12 John. 285; ch. 80, a. 1, s. 74; ch. 9, a. 4, s. 3. So 1 N. H. Rep. 353.

Laws, 198.

Art. 5. Con.

Factor, cases further. 2 Greenl. 199; 4 Esp. 34; 3 id. 60.

Art. 6. Con.

§ 2. *Assumpsit* on a note negotiable. Held, the deft. may prove usury in this note made by his intestate, and a surety in it is a competent witness; but the deft. administrator is not, though the estate is insolvent. 16 Mass. R. 118, 121, Fox & al. adm'rs. *v.* Whitney, adm'r.

A minor is liable to costs in ejectment. 1 Har. & Mc H. 459–462.

3 Greenl. 250–255.

§ 8. But a legatee is a witness for the executor if the interest of such legatee is not increased or diminished by the event of the action.

Art. 7. Con.

§ 6 *con.* She is a witness her husband destroyed his father's will. 3 Har. & Mc H. 2. She had released her dower in the land: her husband was not a party in the action—was heir at law to the testator. His grandson brought ejectment as devisee in the will.

3 Har. & Mc H. 2–4, Wilmot's lessee *v.* Talbot.

3 Pick. R. 63, Commonwealth *v.* Robbins.

§ 12 *con.* On the trial of an indictment against a married woman for larceny, evidence her husband deposited a sum of money to procure the absence of a witness on the part of the government, is not admissible, unless it be shown she was privy to the transaction.

Art. 8. Con.

§ 3 *con.* *Assumpsit* on a promissory note by the bank as endorsee against the deft. as endorser. The court stated, the general rule, as to the competency of witnesses, is, that every person, not interested in the event of the suit, nor incapacitated by his religious tenets, nor by the conviction of an infamous crime, is a competent witness. All other circumstances affect his credit only: 2. The maker or other person, whose name appears on a promissory note, is, within the rule, competent to show it was void in its creation for usury, or other cause. The above rule as to witness was that adopted

Utica Bank *v.* Hilliard, 5 Cowen, 153–160.

in Stafford *v.* Rice, 5 Cowen, 23. In adopting this rule the court followed Jordaine and Lashbrooke, 7 D. & E. 597–601, A. D. 1798, and rejected Walton *v.* Shelly, 1 D. & E. 296, A. D. 1786, though in this case of the Utica Bank, the court admitted the judges in New York, in Winton *v.* Saidler, 3 Johns. Cas. 135, A. D. 1803, had followed Walton *v.* Shelly. So did Ashhurst, J. in Jordaine *v.* Lashbrooke; also admitted the rule in Walton *v.* Shelly had 'been adopted in most of the United States;' but said the decision in Winton *v.* Saidler was 'made by a bare majority of the court.' After all, after forty years consideration of this subject, so important, what is the law? Lord Mansfield was a man of a great and liberal mind; Lord Kenyon's mind was of a different cast. The court, in the case of the Utica bank, did not notice the rule in Walton *v.* Shelly has been judiciously narrowed down and confined to *negotiable instruments actually negotiated in the usual course of business.* Hence saying to one, who, by his name thereon, has sanctioned it as good and current, as coins, you shall not afterwards, as a witness contradict your own sanction and destroy such instrument so put into circulation, as coins are, and made to pass in business into the hands of men who know nothing of its origin. See this whole subject at large in the 10th article in this chapter 90. In Jordaine *v.* Lashbrooke, Lord Kenyon did not put a proper case, for his case supposed *a party to the fraud, usury, &c.* to cover it, objected to the witness; not so is the spirit of the above narrowed rule. The object of that is to protect men strangers to the fraud, &c. into whose hands the instrument may come innocently in the usual course of business, ignorant of the fraud, usury, &c. Hence, the rule is not applied until after the *negotiable* instrument is *actually negotiated* and passed like money to persons knowing nothing of its origin. The rule, well understood, does not allow a *party to the usury* or *fraud, or one who knows it when he takes the instrument,* to cover the taint by objecting to the witness. The cases decide the witnesses admissible as against him. See said art. 10, and especially s. 13.

§ 5. But if A sign a negotiable note as agent for the makers, he is not a competent witness to prove the note usurious in an action against them by the endorsee. In this case Wain *v.* Warlters was overruled.

Crayton *v.* Collins, 2 Mc Cord, 457.

The declarations of the payee of a note made *before* he has endorsed it may be given in evidence in an action by the holder against the maker, otherwise made *after* he has endorsed it. So his declarations after the note is drawn but *before* his endorsement of it, saying it was given for a gaming debt, were admitted to avoid the note in the endorsee's hands.

Id. 214.

Snelgrove *v.* Martin, 2 Mc Cord, 241.

III. Ch. 90. Art. 10. Con.

Under late decisions, a witness, whose name appears on negotiable paper may be received to prove usury in the inception. Note was made to Topliff, or bearer, T. was the witness. See Tuthill v. Davis, 20 Johns. 285; Winton v. Saidler, 3 Johns. Cas. 185, not now law; *quære*, see art. 8, s. 13.

5 Cowen, 23-25, Stafford v. Rice.

§ 13 *con.* As to negotiable paper the rule in fact is, that a person, whose name is on it as endorser, &c. shall not be admitted a witness to say it was tainted with fraud or illegality, *when it passed from his hands in a negotiable state.* Hence the second endorser is a competent witness to prove that a *third* endorser had said that he received and discounted the note at usurious interest. The maker and payee of a note agreed it be void and returned if the maker did not take certain goods of the payee. He immediately endorsed it to the plt. as security for a debt. Held, the *endorser* was a competent witness in an action against the maker to prove *the plt. had notice of the condition on which the note was given, and that the maker did not take the goods of the payee, so that the note became void*—out of the common rule; but the endorser of a note not negotiated *until after* the day of payment, is a competent witness to invalidate it. The rule laid down in Walton v. Shelly is confined to *negotiable* instruments *actually negotiated in the usual course of business.* So a grantor in a deed is a good witness to invalidate it. 4 Serg. & R. 497 and 3 Dall. 506. Other cases, 16 Johns. R. 70, 201; 18 do. 167; 20 do. 285. It seems any endorser is a witness to prove a note void, if the *plt., when he takes it, knows it is tainted, illegal, or of no validity.* In such case there is no reason for protecting him.

Powell v. Waters, 17 Johns. R. 176, p. 188.

Baird v. Cochran, 4 Serg. & R. 399.

Id.

2 Greenl. 199-207, Scott v. Mc Lellen & al.

§ 23. The endorsee sues the acceptor of a bill of exchange, the drawer is not a witness for the plt., because the drawer is liable to damages, interest, and costs, if the plt. calling him shall fail.

Art. 11. Con.

§ 4 *con.* So a stockholder in a bank is a competent witness *after* he has conveyed away his shares, though to his daughter at a distance, and without her knowledge, the deed being delivered to the cashier for her use. Smith v. Bank of W. 5 Serg. & R. 318.

6 Cowen, 27-32, the People v. Dean.

§ 10 *con.* One whose name has been forged is a competent witness on the trial of the indictment to prove the forgery. Otherwise in England; there the objection rose from confounding, formerly, interest in the *question* with interest in the *cause.*

3 Har. & Mc H. 127, 128.

§ 34 *con.* A trustee who sold a wharf is a witness to prove in selling, he excepted the cannon buried in it. Was in a re-

plevin for the cannon, and the witness was not a party to the action. III. Ch. 90. *Art.* 11. *Con.*

A mere naked trustee is a competent witness in a controversy in which a creditor seeks to set aside a deed on the ground of fraud. 1 Rand. 219-242.

§ 1 *con.* But ch. 127, a. 2, s. 24, distinctions as to wills of real and personal estate, and where it is said a *minor* fourteen years of age may make his will of personal property. Art. 12. *Con.*

To constitute a will it is not necessary the *animo testandi* appear on the face of the paper. 1 Mc Cord, 430; and 517, there are no set form of words prescribed for a will. 4 Rand, 585–596, the probate of a will cannot be questioned after seven years, no person in that time appearing to contest it: 2. It seems if two of the three attesting witnesses to a will of lands reside out of the State, and cannot be had by legal process, the will may be proved by the third witness. He proving the attestation of the other two. The statute mode does not take away any mode that before existed.

One of the subscribing witnesses to a will is sufficient for the plt. if he can prove all the solemnities required by the statute. But if the one called can only prove his own signature, other witnesses, if living, must be produced, or if they are dead, their handwriting and that of the testator must be proved; and it is then a question of fact, whether, under all the circumstances, all the requisites of the statute have been complied with: 2. One of the witnesses to the will was called and proved his own signature, and that of another subscribing witness who was dead but the witness had lost all recollection of the facts and circumstances of the execution of the will, and had no knowledge of the testator; held, not sufficient proof, but that the third subscribing witness, who was living within the jurisdiction of the court, ought to be produced. In proving a will, the general principle is that the evidence must prove that all the requisites of the statute have been complied with; and one of the three witnesses to the will is this evidence if he can remember and state them all. Jackson v. Le Grange, 19 Johns. R. 386.

§ 2 *con.* When all the witnesses to a will are legatees, none of them can prove it unless a release be given by one of them of all of his claim under it. In a trial of a land cause where a party produces a will on which he relies, it is enough he call and examine one of the subscribing witnesses. Proof of all the circumstances by one of them is sufficient. If the opposite party would invalidate the will he may call the other witnesses. 1 Nott & McCord, 326, where the ordinary's proving a will is not sufficient. 2 Bay 448. 2 Com. R. 80.

III. Ch. 90. Art. 12. *Con.*

§ 3 *con.* It is the duty particularly incumbent on the witnesses to a will, both to attest the fact of signing, also, the state of the testator's mind at the time of his executing his will. Two of the witnesses being dead, and the third out of the state, enough to prove their handwriting by any credible witnesses. The sanity of the testator is always to be presumed. The contrary must be proved; but if once insane, then his sanity must be proved by the party alleging his sanity.

1 Bay 335. 1 McCord 74. 1 Con. R. 225. 1 McCord 225.

A wife may make a will with her husband's consent, and *to his prejudice*, as then no restraint nor influence can be presumed.

§ 4. The probate of a will is conclusive; as to lands devised as it is as to chattels; so is the filing and recording of a will made in another State or country.

16 Mass. R. 433—443, Dublin v. Chadbourn.

§ 29. *con.* Writ of entry on the demandant's own seizin, &c. Held, 1. A will not proved is no evidence to prove title to land: 2. Nor can one claiming under it prove it was fraudulently destroyed, and give evidence of its contents: 3. A will may be proved to establish title to real estate, though the testator has been dead more than twenty years: 4. If an heir enter, shewing by his acts or words he means to exclude his co-heirs, he is an abator: 5. But without them, his entry accrues to the benefit of all the co-heirs.

1 Pick. R. 114–117, Shumway v. Holbrook. 16 Mass. R. 433.

§ 30. An appeal, &c. In an attempt to set aside a will on the ground of insanity and undue influence, evidence was admitted of the declarations of one of the executors, a legatee and a party to the record as to facts that occurred when the will was made.

1 Pick. R. 192, Atkins, appt. v. Sangers & al. appts.

§ 31. *A revocation to be used must be proved.* Appeal from a *probate* decree approving a will, &c. Held, 1. An instrument purporting to be a will, with a clause of revocation, cannot be offered in evidence as a revocation only without a probate: 2. When a will, after general notice in the usual manner to all persons interested, is disallowed at the instance of an executor and devisee in a former will, the heir at law is bound by the decree: 3. An heir at law attempting to set up a subsequent instrument as a *revocation only*, must do so when it is offered for probate as a will, or he will be barred if he have notice, *semble*.

1 Pick. R. 535–549, Sarah Laughton, appt. v. Akins. 1 Bay, 464

§ 32. A made his will, and afterwards annexed a codicil; this was fraudulently torn off and destroyed; the court admitted a paper to be proved, to be a copy of the codicil, and established it. The facts were found by a jury; cases cited—Cowp. 87, Toller's Law of Executors and Administrators, 74–462; 1 Bay 464; 1 P. W. 731; 7 Ves. Jr. 372.

3 Pick. R. 67–69, Clark v. Wright, ex'r.

§ 33. The testator wrote and signed his will, but not attested, and he gave the remainder of his property of whatever name or nature, &c. On the back he had written—P. S. 'I appoint my

3 Pick. 374. Very v. Very.

father, Jno. Very, executor of the within: the situation of my property is as follows, viz.' &c. all *personal*. Decided the will did not purport a disposition of both real and personal property, so need not be attested.

§ 34. The execution of a third will is a revocation of the two former wills, though the last will be lost or mislaid, in which case *parol* evidence of its contents is admissible. Any the least burning, tearing, &c. *animo revocandi*, is revocation in compliance with the statute; and if the testator do so, and it appears he meant to make another will and did not, the former will is not re-established.

1 Bay 464; 2 Nott & Mc Cord, 272. p. 272.

§ 35. A will is duly proved in a probate court, and burnt by the enemy, with the book in which recorded, its contents may be proved by parol evidence, and at common law, as well as on the statute. The fact of its having been recorded was proved by a regular certificate. The *parol* evidence was to prove in ejectment, it contained a devisee of the land in fee in question. Brent *v.* Doe, Gilm. 211, was the case of a will suppressed and not recorded.

3 Rand 167—169, Smith, &c. *v.* Carter, &c.

§ 36. One subscribing witness to a will swore he saw the testator sign, &c., and that he attested the will in his presence, and that the other witnesses were, also, present, and subscribed their names in his presence, and in the presence of the testator. Held, sufficient proof the testator executed the will in the presence of all the witnesses.

Turnspeed *v.* Hawkins, 1 McCord, 272.

§ 37. Where the witnesses in a will are dead, their handwriting may be proved to establish the will. It is not necessary a will of *personal* property be attested by two witnesses, nor any, indeed, if in the handwriting of the testator, and that can be proved. White *v.* Holmes, 1 McCord 430; revoking wills, 2 Nott & McCord, 272–482.

Sampson *v.* White, 1 Mc Cord 74.

§ 38. Though the statute requires the attestation of two witnesses, yet one is competent to prove the acknowledgment and sanity of the testator, and the attestation of both witnesses in his presence, especially where the other witness is out of the reach of process. Though the statute authorises a *dedimus*, yet this does not exclude other evidence to prove a will. So the testator's presence when the witnesses subscribe, may be proved by other evidence.

Turner *v.* Turner, 1 Litt. 130. Gwinn *v.* Radford, 2 Litt. 137.

§ 39. A will was executed in a foreign country, and a copy of it sworn to be a true copy, by one of the attesting witnesses; who also swore that the testator was of sound, disposing mind, and that the will was acknowledged by him in the presence of the other subscribing witnesses. The will was held to be admissible.

Elmendorf *v.* Carmechal, 3 Litt. 479.

§ 40. Petition for partition on the statute 1 R. L. 507— defts. pleaded *non tenent insimul*, and annexed the will of Benj.

Dan & others *v.* Brown & others, 4 Cowen, 483–498.

III. Ch. 90. Art. 12. Con.

Brown, senior; a witness proved the making and execution in due form, and its being put into his possession, and its return to the testator, and others proved the will could not be found; plts. claimed as *his heirs*, &c.; defts. as their estate under his will. Points decided: first. One of the subscribing witnesses to a will of land may prove its execution on a trial at law, and this though the will be lost, or not produced in court: 2. Where a witness to a lost will proves its due execution by three witnesses, but has forgotten the name of one of them; but having no doubt he was a competent witness, this adjudged sufficient. Several points as to revocations of wills: generally the confession of one plt. or deft. affects only himself, unless they are his partners: So of admissions: a search for a will, &c. may be proved by a party in a cause. Verdict below for the defts; new trial granted, because it was not proved due search had been made for the will.

Jackson v. Luquere, 5 Cowen, 221-231.

§ 41. Ejectment. Held, to prove the execution of a will, it is not enough to account for the absence of the three witnesses, subscribing, to prove the handwriting of one of them only, but there must be proof of the handwriting of all three; that of the testator would be proper to be left to the jury: 2. To entitle a will thirty years old or more to be read, there must be, under it, possession for the time, at least of a part—other proofs.

6 Cowen, 377-383; the case of a lost will: the same will as in Dan *v.* Brown, s. 40.

1 Rand. 108-118, Barnley, adm'r. v. Duke & al.

The testator left one will in Virginia, first made, and another in England. On this, the executor took administration, in England. Held, this did not *ipso facto*, repeal letters of administration, granted in Virginia on the first will; but the English executor must first qualify by giving bond and security as the law directs. The will made in England was recorded in 1785, in the county court of Hanover, in Virginia, on the production of a transcript of the will, with the probate thereof duly certified according to the laws of Great Britian. What is evidence as to a will; 1 Rand. 131-164.

CHAPTER XCI.

ISSUES, PROPER EVIDENCE ON.

Art. 2. Con.

§ 2 *con.* *Non assumpsit* and not guilty, substantially the same. 2 Barn. & Cres. 562.

5 Serg. & R. 394.

On *non assumpsit*, the deft. may prove the plt. is an insolvent debtor, and has assigned his property to trustees for the use of his creditors.

Art. 4. Con.

§ 16 *con.* The plt. insured $2000 in his policy on freight.

He brought an action of *debt*. 8 Wheat 294–312, Hughes *v.* Union Insurance Company. Held, he could recover the sum really due to him, and remit the remainder; and 2 Lord Raym. 814, United States *v.* Colt, 1 Peter, Jr., R. 145: see 8 Wheaton, appendix, 17–24. III. Ch. 91. *Art.* 4. *Con.*

§ 2 *con.* So if A be tenant in common with B, and A and C are sued in trespass, *qu. cl. fr.*, C may, on the general issue, give A's license in evidence, but not B's, the plt. 4 Pick. 127, 128. Art. 8. *Con.*

§ 12 *con.* A license to enter on land is not an *interest*: 2. It is a mere authority personal to the grantee, and revocable at the will of the grantor: 3. It is not a *way*, which is a *real* or *chattel interest* according to its duration. Trespass, *quare clausum*, &c.; plea, a license to carry wood over the plt's. land. Verdict for the plt., seventyfive cents. Held, the *freehold* or title to land did not come in question. No costs for the plt. Plt. sued in the common pleas. 1 Cowen, 568–571.

§ 16. Under a replication of *de injuria* to a plea of son assault, the plt. may offer evidence that the deft's. assault was excessive. 2 N. H. Rep. 539.

CHAPTER LCII.

OUSTER, EVIDENCE OF.

§ 1 *con.* After nul disseisin pleaded in a writ of entry, by tenant in common, proof of actual ouster is unnecessary. 1 Pick. R. 318—329. Art. 1. *Con.*

§ 11 *con.* If the lessor acquiesce in the tenant's paying the rent to a third person, this makes an attornment valid. After the mortgage is forfeited, the tenant of the mortgagor, in possession, continuing the mortgagor's lease, may attorn and take a lease from the mortgagee; and if the mortgagor sue him for rent under his lease, he may set up the attornment as a legal defence: *ouster* where presumed. 1 Harris & Mc. H. 281–297, 54 to 531; and ch. 191, a. 2, s. 8, a good case. 20 Johns. R. 5. Jones *v.* Clark, 20 Johns. R. 15.

CHAPTER LCIII.

PAROL EVIDENCE.

§ 9. If an attorney, in writing, agree to take into partnership, in the business of an attorney, one then not admitted, and no time was expressly fixed when the partnership was to commence, held, it commenced from the date of the agreement: 2 That *parol* evidence was properly admitted to show A was not an attorney when the agreement was made: 3. That *parol* evi- Art. 1. *Con.*

III. Ch. 93. Art. 1. Con.

dence could not be received, to show the agreement was not to take effect until A should be duly admitted, for that would make the agreement different from what it purported to be, viz.: an agreement for a present partnership. 5 Barn. & Cres, 108–110, Williams v. Jones.

A cannot, by *parol* agreement, have a right to dig and use a drain in my land; but such agreement must be in writing. Patent ambiguity, 2 N. H. Rep. 75, 326, 389.

5 Barn. & Cres. 221.

§ 10. *Assumpsit* for goods sold and delivered: plea never promised. The plt. called A as a witness to prove the deft. liable: A on the voir dire admitted he was liable with the deft. A admitted the deft., A, and others were partners. It was admitted he was interested, but might be called by the plt., for he was interested against the plt's. recovery, for if the plt. recovered against the deft., A as a partner must contribute.

5 Barn. & Cres. 385–388, Brackett v. Wier.

Art. 3. Con.

§ 1 *con.* In cases of *frauds* and *mistakes*, *parol* evidence is clearly admissible of what passed before or at the execution of the instrument in drawing it. Christ v. Diffenbach, 1 Serg. & R. 466.

Assumpsit, endorsee against the endorser, on a note endorsed in blank: the deft., by *parol* evidence, may show the plt. received the note under an agreement that he would not have recourse to the endorser.

Hill v. Ely, 5 Serg. & R. 368.

If a party be not able to produce a paper, in order to admit *parol* evidence of its contents, it must be made to appear he has made proper exertions to obtain it. In an action for a libel, parol evidence was not admissible of the contents of a deposition, sent to the governor of the State, containing charges against a public officer, though the court had refused a *duces tecum*, and the governor had refused to deliver the deposition to the plt.

Gray v. Pentland, 2 Serg. & R. 23–31.

1 M'Cord, 407.

§ 2 *con.* In an action on a note, to which *non assumpsit* was pleaded, the deft. may, by *parol* evidence, prove the note was given for a tract of land, the lines and boundaries of which were fraudulently misrepresented by the vendor.

1 Rand. 165–171.

A parol agreement for land, followed by a part performance, enforced in a court of equity.

1 Hop. Ch. R. 124–134, Meads, &c., adm'x. v. Lansing & al.

Mortgage in form for $1000, *parol* evidence not allowed to prove it was for the reconveyance of a lot of land. No fraud, accident, mistake, or surprise alleged. It cannot be allowed *defensively*, nor to prove an *independent collateral* agreement. Numerous cases cited.

2 N. H. Rep. 506.

Parol evidence is admissible to explain and qualify a warranty as to a bill of parcels: but generally, a written instrument cannot be explained by *parol* evidence, unless it refers to something *dehors*, so ambiguous as to require explanation.

3 Serg. & R. 607-609.

Cooke, 431.

If A have a deed of land from B, and omit to register it in time, and then B gives another deed to C, of the same land,

and this is duly registered, and afterwards an act is passed, reviving A's right to register the deed to him, under which act it is actually registered, A's deed holds the land. If registered on an acknowledgment made after the time it purports to bear date, *parol* evidence is admissible, to prove, in fact, where it was executed and delivered.

Parol evidence admitted to explain writings. 1 Const. Rep. 68–73; 2 M'Cord, 520.

§ 6 *con.* Where an agreement concerning the sale of real estate is contained in two papers separate, neither of which contains in itself any reference to the other, *parol* evidence is not admissible to prove their connexion: 2. The doctrine of part performance, is not admitted except in courts of equity. The action was *assumpsit* for the price of two pews in a new meetinghouse, built by the plts. Second count on a special agreement; third count the same, with interest. Plea, *non assumpsit*. Deft. paid for the gallery pew. Held, also, pews are real estate. 3 Greenl. 340–345, Freeport parish v. Bastol. 11 East. 140.

Oath as to slaves presumed, after twenty years' possession of them. 12 Wheat. 590—594.

Assumpsit on a *written* agreement, dated June 20, 1820, by which, the deft., for value received, promised to pay the plts., on demand, four hundred and fortyeight gallons of whiskey. Deft. proved in defence, by *parol*, before the written agreement was executed, he had become surety with the plts., for a debt they owed in New York, which he, the deft., paid, after the assignment of the agreement. When it was given, he objected on account of his being holden to pay their debts in New York. But both plts. replied, that they would not dispose of the agreement or call for the whiskey till those debts were settled by the plts. He then signed the agreement, and after, they repeated the declaration. Held, this *parol* agreement was void though for valuable consideration, as it went to vary the written one. Frost & Smith v. Everett, 5 Cowen, 497, 498.

Important question of insanity when the testator made his will, was tried by a jury. Those who expected the will or papers to be presented to the surrogate for probate, entered a *caveat* against proving it. He proved it in April, 1824. Appeal to the court of chancery. The main question argued, was, if this court could, by law, direct an issue. The chancellor's opinion, the court could direct it. 'The jurisdiction formerly possessed by the court of probate, is transferred to the court of chancery,' and 'may be exercised here, in the course of procedure usual in the court in other cases, unless a special mode is expressly prescribed by law; but no such special method is prescribed.' 1 Hop. Ch. R. 408—415. pp. 109—115,

§ 12 *con.* Administrators conveyed lands to the plt., with covenants of warranty, except all mortgages made by the intestate, and recorded: were three such, and one absolute convey- 16 Mass. R. 116—118.

III. Ch. 93. *Art.* 3. *Con.*

ance of a part: all recorded. As to the absolute deed, on the face of it there was a bond of defeasance not recorded, (was before 1802.) *Parol* evidence admitted, the plt. knew of said bond before he purchased of the administrators.

One may prove the receipt obtained by misrepresentation. 4 Har. & Mc. H. 219–221.

3 Greenl. 399–405, Chadwick v. Perkins.

38 *con.* Where the parties have reduced this contract to writing, the written instrument alone is to be resorted to for the measure of their liability; and if the writing amounts to a declation of trust, its extent is to be gathered from the writing only, uninfluenced by *parol* testimony, and especially if the writing be under seal.

17 Johns, R. 167.

§ 47. *As to levies*, &c. Parol evidence is not admissible to show an execution on which a levy and sale of goods had been made, had been withdrawn, and the levy abandoned by the plt. in opposition to the sheriff's deed. So parol evidence is not admissible to show the land was sold under a different judgment and execution from those recited in the deed; but it is admissible to show fraud in the sale.

Jackson v. Stumbergh, 20 Johns. R. 49.

Ely v. Adams, 19 Johns. R. 313.

§ 48. A deputy sheriff had the deft. in custody on a *ca. sa.*, and the plt. gave the officer a writing, stating he wished him to show the deft. as much indulgence as he could, with safety to himself, and without hazarding, in any way, the debt. Held, the writing being abiguous, *parol* evidence of the conversation between the plt. and the officer at the time, and of collateral extraneous circumstances, to ascertain the nature and extent of the indulgence intended might be shown to the deft., was admissible.

§ 49. *Lost papers.* As to papers lost, there is a distinction. If they have ceased to be of any value or any evidence of title, the slightest proof of loss from lapse of time is sufficient to let in *parol* evidence of the contents: 2. If *muniments* of title, the rule of evidence is more strict.

Jackson v. Root 18 Johns. R. 60; 16 do. 302.

§ 50. As to lost papers there is a distinction, in regard to the tribunals to decide. The evidence of lost papers, to let in such *parol* evidence, is addressed solely to the *judge* trying the cause, who alone decides if sufficient to authorize *secondary* evidence, and in this case he may admit the evidence of an interested witness, or even, *it seems*, that of a party in the cause, to prove the loss of the deed, or other collateral fact: Chamberlain *v.* Gorham, 20 Johns. R. 144; 16 do. 193, as to a will lost; 16 Johns. R. 193; a note, 8 do. 149. The deft. may prove a bill of sale of a ship, *absolute* on the face of it, is a *mortgage*, when sued for wages, &c.; 18 Johns. R. 169; where the other party possesses the instrument, strict evidence of the contents is not required; do. 380

§ 51. *Parol* evidence of an agreement that the dividing line of two tracts of land should be changed, is not admissible: 1 Litt. 66; nor to show arbitrators mistook the law. p. 322. III. Ch. 93. *Art.* 3. *Con.*

CHAPTER CXIV.

PRESUMPTIVE EVIDENCE.

§ 1 *con.* Ejectment for several tracts of land *in Maryland* one called *enlargement*. The plt. produced a certificate of survey made for John Israel, January 10, 1720, one hundred acres, and a grant to him July 10, 1724, and his devise thereof dated January 13, 1723, duly proved March 11, 1728, to his two sons, and several mesne conveyances from them to the plt's. lessor. John Israel died before said grant or patent issued, so it was void. Held, the jury, if they found possession had been under the title, might and ought, from the great length of time, to presume a patent to the sons. Action was in 1799. ART. 1. *Con.* 4 Har. & Mc H. 287-291, Carrol *v.* Norwood.

If A claim a lot of *wild* land and pay taxes, &c. for seventy years, the jury may presume a deed, though he never actually occupy, and where no adverse claim for those years. 1 Greenl. 17-21, Farrar & al. *v.* Merrill.

After twenty years from the partition of land between proprietors, it will be presumed the advertisements, &c. were legal, if possession has in general conformed to the doings of the meetings. 1 Phil. on Evid. 119; 10 Mass. R. 105, Colman *v.* Anderson; 3 Mass. R. 899; 7 do. 483; 11 do. 227; 7 Wheat. 59; 2 Nott & Mc Cord, 114. 2 N. H. Rep. 210.

If a person has been absent many, say fifteen, years, and not heard of, and no circumstance appears to account for his absence, the jury ought to presume his death. 3 Serg. & R. 490, Miller & al. *v.* Beates. ART. 3. *Con.*

§ 7. A grant is presumed after a parish, in a well settled country, has occupied a piece of ground ninety years for a meeting house and a burying yard. 3 Serg. & R. 509.

What circumstances justify the presumption of a deed, is matter of law; and it is the duty of the court to give an opinion, whether the facts proved will justify the presumption. 4 Binn. 416.

§ 8. An executor of a mortgagee, under a power from a mortgagor, sells the land to A, a deed executed to him at such sale, nineteen years after the sale, was deemed good by relation, there being no intervening right, and the court, after so many years, presumed that a deed was given at the time of the sale, when it was proper to be given, and that it was lost, and that the deed afterwards given was for greater caution. Doolittle *v.* Lewis, 7 Johns. Ch. R. 45.—8 do. 129.

III. Ch. 94. Art. 3. Con.

§ 9. Rent due by indenture is not within the act of limitations; but after *twenty years* from the last payment, payment of the rent is presumed. This presumption may be rebutted by circumstances. Debt presumed to be paid from the circumstance the creditor omitted to offer it in set-off when he might have done it if not paid. Henry *v.* Brown, 19 Johns. R. 33.

Bailey *v.* Jackson, 16 Johns. R. 210.

§ 10. The presumption arising from lapse of time is merely a presumption of fact which may be repelled by other facts. 1 Littell, 59.

§ 11. In the case of slaves brought into Virginia from any of the United States, before the act of 1792, the fact of the master having taken the oath required by law, within ten days after removal, will be presumed, after the lapse of twenty years' possession, without claim of freedom on the slave's part, but the *presumption* may be avoided by circumstances, and infancy is a circumstance of this effect, though not conclusive.

Abraham *v.* Matthews, 6 Munf. 159.

Art. 4. Con.

§ 4 *con.* But the *presumption* is for the jury alone, and not for the court to make. See sundry cases, ch. 70, a. 10, s. 3.

Hartwell *v.* Root, 19 Johns. R. 345.

§ 10. Held, where a person is bound to do a certain act the omission to do which is a culpable neglect of duty, the performance of it is presumed if the contrary be not proved.

CHAPTER XCV.

RECORDS.

Art. 1. Con.

§ 10. How a fact omitted to be recorded may be proved. Motion for a *mandamus* to a court of sessions, directing to make a record of a material fact; that is, that the order of removal of a pauper from ——, '*was quashed for want of proof of the chargeability of the person removed*,' being the only ground of removal. Held, 'the respondents are not at all events concluded by the judgment of the sessions, but may, on the trial of another, appeal against another order of removal of the same party, explain by evidence to the sessions, the particular ground on which the former order of removal was quashed.

5 Barn. & Cres. 511, the King *v.* the Inhabitants of Wheelock.

§ 11. A fact not recorded, how not presumable. On error brought, held, a probate decree that a person is *non compos mentis* or appointing a guardian over him for that cause, without notice, is absolutely void; and where the probate records are apparently entire, and no loss of papers in the probate office is suggested, it cannot be presumed even after thirty

5 Pick. 490, 492, Hathaway *v.* Clarke.

years, that any decree was passed, adjudging a person to be *non compos*, or any notice given which does not appear. Decided April, 1828. See Chase *v.* Hathaway, 14 Mass. R. 222.

III. Ch. 95. *Art.* 3. *Con.*

CHAPTER XCVI.

VERDICTS AND JUDGMENTS.

Art. 1. *Con.*

§ 1 *con.* Case for stopping a way appurtenant to the plt's. land. Held, a verdict and judgment, on the general issue pleaded, do not conclude the parties as to the title. In cases of torts, generally, only the point directly put in issue is settled conclusively. Otherwise, if the title be put in issue by a plea of soil and freehold; and 2 Johns. R. 24; 4 Day, 431; 5 East. 353, Outram *v.* Morewood.

2 Pick. 20–23, Standish *v.* Parker & al.

A judgment deciding in favor of freedom of one held in slavery, has no effect against any party but the deft. and those claiming under him *posterior* to the judgment.

4 Rand. 500–503.

1 Greenl. 202–207. After verdict every promise in the declaration is to be taken as an *express* promise; and 7 D. & E. 522.

Assumpsit. Held, a verdict, and judgment thereon, are not admissible evidence of a copartnership, even where that fact was expressly put in issue by the pleadings, unless the action in which such evidence is offered, is between both the parties to the former action.

3 Greenl. 165–171, Burgess *v.* Lane & al.

§ 23. *Judgment against the principal in a bond is not conclusive evidence against his sureties:* 2. If the principal and sureties be jointly sued, and the judgment is erroneous as to the sureties, it must be reversed as to all, though the judgment would have been good against the principal, if he had been sued alone. Was debt on sheriff's bond to the State of Virginia, conditioned to collect and pay to the State treasurer all levies, taxes, fines, forfeitures, and amercements in his county, including poor taxes. The special verdict found the sheriff had no notice he was appointed collector of the poor rates, unless a certain judgment proved notice and concluded him. Held, if it did, it did not conclude the sureties. Seems contra Gilmer's R. 235; 3 Atk. 248, Greensides, &c. *v.* Benson, &c. Same case in Ridgeway's R. differently stated, case, 401. Sureties and joint contractors do not claim under their principal, or each other, (so not privies.) Vin. Abr. 464; 3 Munf. 191; 4 Munf. 215, are cases cited in this case of Manford, &c. *v.* Overseers of the poor, &c. 2 Rand.

HJ, Ch. 96. *Art.* 1. *Con.*

313–323. Appealed. Manford, &c. were the original defts. in said bond to the State including, by construction, the poor rates, &c.

In a joint action on contract the plt. must have judgment against all the defts. before the court, or no judgment. 2 Rand. 446, 448.

§ 24. A court cannot mend a special verdict by expunging what may be thought surplusage, or supplying a notorious fact in order to support a judgment of guilty. State *v.* Duncan, 2 Mc Cord, 129. A judge may, at his discretion, request a jury to reconsider their verdict. Id. 400.

§ 25. Among several judgments, that in which the record is first filed takes preference, and to determine this the court will inquire into the fractional parts of a day; and so it seems of mortgages, the one first registered is preferred. So of executions against goods, the one first delivered to the officer binds the property, and it seems in all these cases the court will so notice the parts of a day; and if the sheriff levy and sell the goods on the execution last delivered, he is liable to the plt. on the first.

§ 26. Judgment was recovered in Massachusetts against the present deft., a citizen of New York. Debt was brought on this judgment in New York, deft. pleading he was such citizen of such a town, and in the State of New York, during the whole proceeding in Massachusetts. General demurrer to the plea, and it was adjudged bad, for it was not inconsistent with this plea, if he appeared and defended: also held, 2. In an action on such judgment, the deft. may by plea show the court had no jurisdiction of the person of the deft. or of the subject matter of the suit: 3. The record of such judgment is *prima facie* evidence that the court in Massachusetts had jurisdiction, and to do away the effect of the record, the contrary ought to be clearly and fully shown: 4. The only plea of the general issue, applicable to the declaration on a judgment in another State, is *nul tiel record.* The various cases cited are generally found in this chapter. Shumway and others *v.* Stillman, 4 Cowen, 292–297.

Bent *v.* Sternburgh, 4 Cowen, 559–564.

§ 27. Trespass *quare clausam fregit.* Second action for the same trespass between the same parties. Held, 1. The judgment of a court of concurrent jurisdiction directly on the point, is, as a plea, a bar, or as evidence, conclusive between the same parties on the same matter directly in question in another court. As where B brought trespass *quare clausum fregit* in May, 1816, laying the trespass with a *continuando* between November 1, 1814 and November 24, 1815, and recovered, then brought trespass against the same deft. for a

subsequent injury to the premises in question in the former suit. Held, the record in that suit followed by parol evidence that the premises in question were the same in both, was conclusive of the plt's. title in the second action; that it operated against the deft. by way of estoppel, whether it was pleaded or given in evidence in the second suit: 2. But held also, the deft. might, in the second suit, have shown title in himself by alienation, or adverse possession, acquired after the time in question in the first action. Both parties claimed to own the premises. The second action embraced a different portion of time, and in it the deft. set up a different title, and cited Outram *v.* Morewood, 3 East, 357; and 3 Cowen, 120, Gardner *v.* Buckbee. The court cited this for the plt. holding the former judgment as much a bar when in evidence as when pleaded.

§ 28. The plt. sued a justice judgment, the deft. pleaded, 1. Nul tiel record: 2. Payment. Held, this was not trial by the record, and may be joined with a plea of payment. His judgment is not determinable at bar by the record 'it ranks as a specialty, and the plea of *nul tiel record*, if it be good and capable of trial, in this case, must be tried by a jury.'

Witherwax *v.* Averill, 6 Cowen, 589–590. 16 Johns. 233.

§ 29. Debt on judgment. Plea, payment; the deft. may prove payment in any property given by the deft. and so accepted by the creditor, as goods, land, &c. A less, in money, cannot pay a greater sum.

5 Pick. 41–50, Howe *v.* Mackay & al.

§ 4 *con.* The fourth article in the constitution of the U. States was intended to prevent any State, by its laws, giving freedom to slaves fled from another State, but it is not to be so construed as to exempt slaves from the penal laws of any State in which they may happen to be. Hence a slave fled from another State, charged with fornication and bastardy in Pennsylvania, cannot be delivered over to his master till security is given to indemnify the county against the expense of maintaining the child.

Art. 4. *Con.*

Commonwealth *v.* Holloway, 3 Serg. & R. 4–6.

If a slave abscond from another State, and after her arrival in Pennsylvania become pregnant, her issue born in Pennsylvania are free.

2 Serg. & R. 305.

It is not necessary the registry state the person registered was a slave for life or a servant for years; but it must expressly state the sex. Wilson *v.* Belinda, 3 Serg. & R. 326–396; as to county, id. Must be made in 6 months after the child was born.

1 Serg. & R. 23.

In the case of a *fugitive* slave, a hearing before a judge, on a *habeas corpus*, and his certificate of his absconding, are conclusive, and a *homine replegiando* does not lie to try the right of such slave, to freedom.

Wright *v.* Deacon, 5 Serg. & R. 62.

III. Ch. 96. Art. 4. Except as to the registry, the principles in this section hold in all the free States.

Con.

§ 24. The record of a judgment against the sheriff is not evidence against the deputy of any other fact than that a judgment was rendered, but not that such judgment was incurred by the default of the deputy. A judgment of the general court against the sheriff is not admissible evidence against the deputy, because he was not a party to the suit, and because by the statute he is liable to the sheriff, whether a judgment have been obtained against the sheriff or not.

Lucas v. Knox, 2 Bibb, 458, Johnson v. Thompson, 4 Bibb. 294.

§ 25. Where the court can find on the record of another State, a single word or act of the court from which a judgment may be inferred, they will give effect to it; but where a record shows a verdict only, and no judgment, an action cannot be maintained on it.

Mincle v. Carrath, 1 Constr. Rep. 171.

CHAPTER XCVII.

WRITINGS NOT SEALED.

Art. 3. *Con.*

§ 17. *Scroll no seal.* As if an instrument conclude, 'witness our hands,' with a scroll annexed to the signature, and the word seal written therein, this is only a simple contract, and if in the form of a penal bill, the plt. must declare for the principal sum and not for the penalty.

2 Rand 446—448.

§ 18. A single bill under *seal* is not a note, but a *specialty*; and the drawer and endorsers of such note, made negotiable and payable at the Farmer's Bank, cannot be sued *jointly*, The contracts are different; the obligator is bound under *seal*, the indorsers only under their *hands*. Their defence is different; the statutes which authorize a *joint* action, against the drawer and endorser of foreign bills of exchange and certain notes, respect only *simple* contracts, not *specialties* like this.

4 Rand 253—255, Mann v. Sutton.

§ 19. Debt lies on a promissory note not under seal against executors and administrators, and must be in the *detinet*, except where they are liable *in devastavit*. 8 Wheat, 642–673, case in Tennessee.

Smith v. Morrison, 3 Marsh 82.

§ 20. Though a sealed promise to pay a debt merges the simple contract, yet the mere recognition of the debt by a sealed instrument, with a provision as to the mode of liquidating and adjusting the balance, is no merger. The acknowledgment of a debt at the foot of an account stated, with the debtor's seal, is a specialty, though the instrument concludes—'as witness my hand,' without mentioning the seal.

1 Bibb. 492.

A written agreement cannot be avoided by a subsequent parol one, either in equity or in law. Long v. Dooley, 4 Hayw. 128.

§ 21. A writing though not sealed, cannot be contradicted, varied or materially affected by *parol* testimony: 2. But simple agreements in writing may be avoided by *parol* evidence of *fraud*, or want or failure of consideration, or by the waiver of performance: 3. They may be varied by parol enlargement of the time of performance: 4. A debt discharged under the insolvent act is a good consideration for a new promise. Hence, 5. A note payable in specific articles, *absolute* on the face of it, cannot be defeated by *parol* evidence. Erwin *v.* Saunders and Ely, 1 Cowen 249–251, that is, parol evidence to prove such a note *conditional*, is not admissible. III. Ch. 97. *Art.* 3. *Con.*

CHAPTER XCVIII.

WITNESSES.

§ 5 *con.* One is a witness who believes in the being of a God, and that he will punish falsehood in this life only. But, 18 Johns. R. 98, Jackson *v.* Gridley, infidels who do not believe in a God, or who, believing in a God, do not think he will reward or punish them in the *world to come*, is not a competent witness in any case nor under any circumstances. Butts *v.* Swartwood, 2 Cowen's R. 432–572. 2 Tenn. R. 96.

§ 9 *con.* *Fits of derangement* no objection to one's competency or credibility as a witness, if sane when he gives his testimony. 7 Wheat. 455–470.

In Gridley's case, the witness totally disbelieved in the existence of a Supreme Being. He believed in no punishment by an overruling Providence in this life. Hence, as to the future punishment, the opinion of Chief Justice Spencer was an *obiter dictum*. 2 Cowen 433. p. 434.

Willes, C. J. admits a person as a witness, if he believe in a God and his punishment *in this life* or the next. See his R. left in his own handwriting, pages 545, 549, 550, and 551.

In an action against an attorney to recover monies collected by him of the plt's. debtor, he is a competent witness to prove he paid the money to the attorney. 5 Pick. 447, Gifford *v.* Coffin.

§ 22. *con.* 2 Rand, 541–542, one a witness to prove his deed lost, cited 1 W. Bl. 532; Forbes *v.* Wale, Godb. 193–326; 11 Johns. R. 57; 16 do. 193; 6 Munf. 201; 8 East. 289; 10 Johns. R. 374.

The plt. having proved the deft. broke open the plt's. trunk on a voyage, and plundered it, is a witness of necessity to prove the articles in it. 1 Greenl. 27 30.

§ 38. How a witness may be impeached. His credit, when he has testified or given his deposition, may be impeached, by shewing he has, out of court, made a different statement, either

III. Ch. 98. before or after giving his testimony. Nor is it necessary he be first inquired of as to such different statement, or be present when his credit is impeached; this is every day's practice. 17 Mass. R. 160–169–Tucker *v.* Welsh, Jr.

2 Nott & Mc Cord, 13–17. § 39. The court will enable a witness to decide if he shall be endangered by his answer, and if it may form a link in a chain of testimony against him, he cannot be compelled to answer: 2. The witness and not the court may judge of the tendency of a question, to criminate or not to criminate himself. But in a prior case, 2 Cons. Rep. 167, it was decided if a witness refuse to answer questions proposed to him, respecting his interest in a cause, he is to be committed for a contempt of court, and closely confined without bail or mainprize, until he purges the contempt by swearing.

§ 40. The testimony of a witness taken down by a magistrate, cannot, on the trial of the same matter in court, be used in evidence in chief, particularly when the witness is present, but it may be used to shew he has made contradictory statements.

State *v.* Mc Leod, 1 Hawks, 344; 2 do. 186.

2 McCord 362. § 41. The father is a competent witness to prove a gift made by himself to a child.

2 McCord 214. § 42. A sold a negro slave to B. B, in a few months after sold her to C, and took his note in payment. The bearer of the note sued C. Held, A was a competent witness to prove she was sound when he sold her to B, but a surety in such a note would not be a witness.

373.

Jackson *v.* John and Mary Delancy, 4 Cowen, 422–432. § 43. *Grantor, &c., where a witness.* Ejectment for a lot in the city of New York. Held, 1st. The grantor's widow, who died insolvent and had warranted the land, was a witness to support the grantee's title, on being released by him, though she did not release her interest in the personal estate of her husband. The court thought her interest, if any, was extremely remote and contingent: 2. The grantor, in a quit claim deed, is a competent witness to support the grantee's title; but otherwise if he has warranted the land.

CHAPTER XCIX.

SEVERAL MATTERS IN EVIDENCE.

Mechanic's Bank *v.* Smith, 19 Johns. R. 115. § 19 *con. Bank rules do not bind third persons.* 1. An entry by a teller or clerk of A's deposit in the bank-book, being only the act of the agent of the bank and not of both parties, is not conclusive evidence, but A may afterwards shew a mistake, and recover in an action for money had and received, the sum not credited: 2. Though a bank incorporated may be empowered to make by-laws, &c., they do not affect the rights of

third persons: Hence, 3. A by-law, or rule of a bank, that III. Ch. 99.
all monies paid and received, must be examined at the time, does not preclude a party dealing with the bank, from shewing afterwards, that there was a mistake in the accounts of deposits and receipts. The rules and by-laws of a bank are evidence against the bank only. See ch. 90, a. 10, s. 28; ch. 20, a. 10, s. 46.

§ 27 *con.* Ejectment for a piece of waste land the deft. enclosed by the side of a public highway, and occupied it thirty years, without paying any rent; after that time the owners of the adjoining land demanded 6*d.* rent, which the deft. paid on three several occasions. Held, this, in the absence of other evidence, was conclusive to shew that the occupation of the deft. began by permission. So no adverse possession. Plt. recovered. No adverse possession so long as A's right is allowed, though he, in fact, has no title. 8 Barn. & Cres, 413. p. 57.

CHAPTER C.

DEMURRER TO EVIDENCE, AND BILLS OF EXCEPTIONS.

§ 2. *Where the party must join in demurrer*, &c. As where an objection is made to a demurrer to evidence that the testimony of the witness has not been correctly taken down, and the witness has left the court, so that he cannot correct, &c. This is not a sufficient excuse for not joining in demurrer, unless the error complained of is stated, and it appears also it would affect any of the questions to be decided by the court on the demurer—was a writ of right, and the mise joined. A demurrer to evidence must contain the evidence on both sides. Art. 1. *Con.* 2 Rand 68-86, Norvill v. Caman, &c. 4 Rand. 252, 255, 406, 412.

11 Wheat, 171-184, United States Bank *v.* Smith, endorsees and endorsers of a promissory note. Held, 1. On a demurrer to evidence the judgment of the court stands in the place of the verdict of the jury, and the deft. may take advantage of any defect in the declaration by motion in arrest of judgment or by a writ of error: 2. On a demurrer to evidence the court is substituted in the place of the jury, as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted: 3. Demurring to evidence is not to be encouraged.

Several rules as to demurrers to evidence. One issue must be joined: Another, every fact must be previously settled. 11 Wheat. 320-324. 9 Wheat. 651-656.

§ 7. *As to time of allowing a bill of exceptions.* Need not be drawn up in form at the trial; then the exception may be taken and noted by court, and may be afterwards, during the term, reduced to form and signed by the judge, *nunc pro*

III Ch. 100. *Art.* 1. *Con.*

tunc, and on the face of it purports to be signed at the trial; error, if it appear otherwise.

Case of concealment in making a contract. Held, though a judge may refuse to declare the law to the jury on a hypothetical question, not warranted by the testimony in the cause, yet, if he state the law erroneously, his opinion may be revised in the court above; and if it can have had any influence on the jury, their verdict will be set aside.

11 Wheat. 59–78, Etting in error v. U. S. Bank.

19 Johns. R. 246. A bill of exceptions must be presented to the judges of the Common Pleas, and be signed and sealed by them, while they are sitting together as a court. Three judges must sign and seal such bill. 13 Johns. R. 320. No such bill in a criminal case. 13 Johns. R. 90. Where the record is made up, a general assignment of errors to a bill of exception is sufficient, 475. 14 do. 304.

6 Cowen, 555–568. No bill of exceptions lies in a criminal case. Vane's case, Keling, 15.

5 Pick. 528. Exceptions will not lie to the Common Pleas on a matter within their *discretion;* as of a continuance, &c.

§ 13. A bill of exceptions does not lie on the stat. 1820, ch. 79, s. 5, to a judgment of the Common Pleas, on a report of referees made on the referee act of 1786, ch. 21, to that court. 2 Pick. R. 25. Dean *v.* Dean.

Nor for a wrong direction of the Common Pleas, on a complaint of bastardy, on the stat. 1785, ch. 66. 2 Pick. R. 386.

Nor if the court refused to instruct the jury on a point of law, so stated as to involve an opinion on matters of *fact*. United States *v.* Burnham, 1 Mason, 57—70.

1 Rand. 461. Where a bill of exceptions states the case imperfectly, the cause will be remanded for a new trial.

3 Rand. 106–117, Brooke v. Young.

1. Where a bill of exceptions states a case imperfectly, the cause ought to be remanded for a new trial: 2. One bill cannot, it seems, be referred to, to supply the omission of a fact in another: 3. If a party ask the judges' instructions, on points of *fact*, as well as of *law*, he is not bound to separate the fact from the law, but may refuse the instruction altogether: 4. A bill of exceptions can never be converted into a demurrer to evidence.

4 Rand. 256–262.

If the court instruct the jury that the facts proved are not conclusive evidence, this is not an instruction as to the *weight* of evidence, as it leaves all open to the jury. Hawks, 309.

4 Band. 606–610, Kitty v. Fitzburgh.

A party asking the instruction of the court to the jury as to the law, must specify the points, and not ask instructions, generally, as to the law arising out of a complicated mass of evidence. See ch. 187, a. 17, s. 19; 3 Rand. 115, Brooke *v.* Young.

Under stat. 1822, ch. 193, exceptions can be alleged only to the opinion of the court in some 'matter of law,' 'involving and deciding the legal rights of one of the parties,' as contrary to law, to admit or reject a witness or written proof, &c., but not to the exercise of the *discretionary* power of the court, as to the terms or times of granting amendments of what is legally amendable, continuances, leave to enter actions after the usual time, to take depositions, for postponement of causes, &c. Such 'are not questions of law, but of expedience, and they are not settled by any fixed legal principles, but according to the circumstances of each case, and the sound discretion of the judge.' 8 Greenl. 116—119, Clapp v. Balch.

A right to file exceptions under stat. 1820, ch. 79, s. 5. is not equivalent to a right of appeal; hence error lies to the Common Pleas in cases where the *ad damnum* does not exceed $100. 4 Pick. 497—500.

1 Cowen, 622. A bill of exceptions is confined to the points whereon it is taken. 5 Cowen, 243—248. No exception if left to the jury. id.

In a demurrer to evidence, it is not necessary to enter on the record an admission of all proper inferences from the facts, but it may be left to the court to draw such inferences. Admitted the jury is the most proper tribunal to make inferences; but the court proceeds on the ground the demurrant admits the judges may draw them. In fact, as the practice is, both parties admit this, but not when one is compelled to join in demurrer; that party, in such case, does not admit the judge shall draw the inferences, which, on the sound principles of law, a jury only draws. To obviate this objection, it seems courts in Virginia do not allow a party to demur to evidence, when the case is clearly against him: 2. Nor if the court doubt what facts are reasonably to be inferred from the evidence demurred to, in which case the jury is the most fit tribunal to decide: 3. All the evidence, both sides, must be put into the demurrer. Then to consider the demurrer, as if the demurrant had admitted all that could, reasonably, be inferred by a jury, from the evidence given by the other party, and waived all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence, which do not necessarily flow from it. This reasoning, if sound, holds in every State. This may be right in most cases; but in some cases inferences must be drawn, as the evidence is not properly used then the party compelled to join, is compelled to give up what is strictly right, that is, inferences to be drawn by a jury. 2 Rand. 353—383.

2 Serg. & R. 185—413; 1 Litt. 232. Instructions on ab-

III Ch. 100. Art. 1. Con.

stract points of law, however correct the principles assumed may be, ought not to be given.

If contradictory evidence be given in a cause, it is error in the court to instruct the jury that if they believe it to be true they must find for the deft. If improper testimony is admitted to go to the jury, the judgment must be reversed, though legal evidence to the same facts, be afterwards introduced. Shearer *v.* Clay, 1 Litt. 267. Instructions as to a nonsuit, can be rightfully given, only where there is an *entire* failure to prove the plt's. right of action. Garman *v.* Howard, 3 Marsh. 384.

Hurt v. Miller, 3 Marsh. 337.

CHAPTER CI.

COVENANT.

Art. 3. Con.

§ 6 *con.* Covenants, how affected by statutes. The city conveyed lands for the purpose of a church and a cemetery, with covenant for quiet enjoyment; and afterward, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of the lands as a *cemetery*. Held, 1. This was not a breach of the covenant that entitled to damages, but it was a repeal of the covenant: 2. A corporation, cannot, by contract, abridge their legislative powers: 3. Where one covenants not to do a thing which it is lawful for him to do, and an act of the legislature comes after, and compels him to do it, then the act repeals the covenant, and *vice versa;* but when a man covenants to do a thing, which was unlawful, at the time of the covenant, and afterwards a statute makes it lawful, it does not repeal the covenant. The action was on the covenant for quiet enjoyment, pleas the above matter, demurrer thereto, judgment for the defts. Numerous cases English and American, were cited. The conveyance to the church was February 25, 1766; the city performed till it passed the by-law, in October 1823. Both parties held it valid. The rule s. 6, seems to have been admitted by the plts. as applicable to individuals, but the plts. objected that the city could not pass a legislative act, to repeal its own covenant. The court answered that the city 'had no power to limit their legislative discretion by covenant, and they are not estopped from giving this in answer. 2 T. R. 169.'

The Brick Presbyterian Church v. City of New York, 5 Cowen, 538—542.

§ 12 *con. What is not maintenance.* As where a number of Baptists, to support a different sect, &c. bound themselves in a bond, to pay each one his proportion of the expense of defending any suit against any one of their number for the recovery of such taxes, and of the costs of any other legal mode of resisting the payment thereof. Held, this bond was valid, &c.

1 Greenl. 292-297, Gowen v. Nowell.

§ 28. Action of *covenant* decided, it does not lie in New York on a contract to be performed in *Pennsylvania*, with a *scrawl, and the word seal in loco sigilli*, though by the law of Pennsylvania, this constitutes a seal: 2. The form of the action relates to the *remedy* and is governable by the *lex fori;* plea was *non est factum*. The contract signed by Herriot, purported a seal in the usual form. The common law of Pennsylvania, on the subject, was proved by the oath of a counsellor at law of that State. It seems, though not stated, the contract was made in Pennsylvania. The court said, 'we are satisfied that Meridith *v.* Hinsdale, was decided without proper attention.' 'The dispute is merely upon the *remedy*, that is to say, whether the action shall be *covenant* or *assumpsit*, upon a given contract, between two persons within the jurisdiction of the court.' Mr Cowen's notes occupy in full page and fine print, 21 pages, on the subjects of *lex loci contractus* and *lex fori*, which he says so often occur among so many States, connected in business, in policy, &c. yet, in many respects, independent of each other. Cites some hundreds of cases, a sufficient part of which are found in this work.

III Ch. 101. *Art.* 3. *Con.* Andrews & Jerome v. Herriot, 4 Cowen, 508—531.

The distinction between *lex loci* and *lex fori*, is now too clear and well settled to need a vast deal of illustration.

§ 6 *con.* And their local meaning, as in a contract respecting *cider;* and it appears when the contract was made, the word *cider* meant the juice of the apples as soon as it was expressed. Held the contract must be construed in conformity to this *local* meaning of the word *cider*.

Art. 5. *Con.* 5 Barn. & Cres. 628.

CHAPTER CII.

COVENANT. ON INDENTURES OF APPRENTICESHIP.

§ 2 *con.* Though the indenture be not assignable, yet the assignment, as between the old and new master, is valid, as a covenant for the apprentice's services, and if he continue to serve the new master, there can be no failure of the consideration of the assignment. 19 Johns. R. 113.

Art. 1. *Con.*

§ 20. Held, the covenants in an indenture of apprenticeship, are independent covenants. Hence acts of misconduct on the part of an apprentice, stated in the plea, were not an answer to the action brought for breach of the covenant, by the master, to instruct and maintain the apprentice, during the time agreed upon by the indenture.

5 Barn. & Cres. 460.

§ 21. The indenture was between the ward and his guardian, and the master declaring the duties of the apprentice in the usual form, and concluding thus 'for the true performance of all

Bull v. Follett, 5 Cowen's R. 170—172.

III. Ch. 102. Art. 1. Con.

and singular the said covenants and agreements, the said master, apprentice, and guardian, have hereunto interchangeably set their hands and seals,' &c. Held, this bound the guardian to see the apprentice fulfilled all his duties to his master: 2. No precise or formal terms are necessary to constitute a covenant: 3. The inquiry always is, what was the intention of the parties. The court cited Mead v. Billings, 10 Johns. 99; Ackley v. Haskins, 14 John. 374; Blunt v. Melcher, 2 Mass. R. 228; Branch v. Ervington, Doug. 518; Whitly v. Lofus, 6 Mod. 191. Nonsuit set aside, and new trial granted.

Art. 3. Con.

§ 6. Under statute 1793, ch. 59, brought before the apprenticeship expired, for a breach of the covenant to maintain the apprentice, damages are recoverable only to the date of the writ. There is no reason to think the legislature meant to alter the common law rule of damages; 5 Cowen, 480–483; same principle as in James v. Le Roy, s. 5, that is, A's slave works for B, A may recover his earnings without notice, &c.

5 Pick. 250—257, Butler v. Hubbard & al.

§ 7. Covenant broken on an indenture of apprenticeship made in 1819 by selectmen and overseers of the poor of W——, binding George Strong, aged 15 years, son of Gilson Strong, to Butler, paper maker, &c. Held, void, as it did not contain a provision for instructing the minor in reading, &c., pursuant to statute 1793, ch. 59, s. 4. So void as the minor over 14, did not *bind himself*, and not stated he had no father, mother, or guardian, in the State, the binding was not within the act of 1794, ch. 64: 3. The binding is void as to all parties, where a stranger, having no authority over a minor, undertakes to bind *him* as an apprentice. The apprentice absented, &c. Held, on oyer and demurrer by the defts. to the declaration generally: see 2 Pick. 451; 1 Gallis, 37; 8 Mass. 171; Hodgson v. Dexter, 1 Cranch. 345; the matter that made the contract void appeared in the *contract itself*, and then the agent is not bound, though he binds not his principal.

CHAPTER CIII.

CHARTERPARTIES.

Art. 1. Con.

Ogden v. Barker, 18 Johns. R. 87.

§ 6. *Charterparty*, where not affected by *an illegal agreement:* as where the plt. and deft. executed one under hand and seal, to transport goods from Virginia to Cadiz the same day, (Jan. 26, 1813.) Agreed on a separate paper, not under seal, referring to their charterparty, and stipulating the owners should have on board a *Sidmouth license*, to protect ship and cargo. Held, these were distinct contracts, and though the agreement not sealed, was illegal, it did not vitiate their charterparty.

§ 7. Error from the common pleas. *Assumpsit* for freight, prim- III. Ch. 103.
age, and average. Main point (among many stated,) was, to *Art.* 1.
wit, when the owner of a vessel parts with his ownership and *Con.*
possession, in the vessel, to the charterer, he is viewed as owner,
and the former has no *lien* for freight. The vessel was charter- Clarkson v.
ed for the voyage to Douglas, by Lockwood, &c., Edes master, Edes, 4 Cow-
who sued the plt. in error, for freight, &c. Judgment for Edes. en, 470–482.
The real, and only question, in fact, was, if the general owner meant, on a fair construction of the charterparty, to part with the possession of the vessel during the voyage. Decision, they did not; and understood Edes sued for their benefit.

§ 13. *To take effect or not on a contingency:* as where *assump-* Art. 3.
sit on a charterparty of affreightment, made between the plts., *Con.*
owners of the St Patrick, and the defts., on a voyage from 2 Barn. &
Cadiz to St Blas de California, thence to G., to take a home Cres. 564–578,
cargo. The charterers caused another ship to be chartered, to Soames & al.
go out in ballast, and bring home a cargo from G., with a pro- v. Longergan & al.
viso, that in the event of the non arrival of the St Patrick at Guayaquil, then the second charter should be void. Held, that 'non arrival,' meant non arrival within such time, as might answer the purposes of the charter of the Grant, (second ship,) and the St Patrick not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. The question was, whether the *non arrival* was as to time indefinite, as were the words of the proviso, or within one hundred and forty days, &c., period of time, included within the running and demurrage days of the St Patrick. In fact, the construction of the proviso, as to time, was not on the words of it, but on external circumstances and considerations.

§ 14. By a charterparty, the freighter of a ship agreed to 5 Barn. &
pay £200 a month, for six months certain; so in proportion for Cres. 167.
any long time, he might employ her: the owner to keep her in repair. During the voyage, agreed she wanted repairs which required twenty-eight days. Held, the freighter was not entitled to deduct those days, in calculating the time he was to pay freight.

§ 19. Case of *lien* for freight money due on a charterparty. Art. 4.
8 Wheat. 625–641, Gracie v. Palmer & al. in error. *Con.*

This *lien* arose in the following case. By the charterparty the *freight* was $30,000 for the use and hire of the ship America, on a voyage from Philadelphia to Madeira, and thence to Bombay, and at the option of the charterer, to Calcutta, and back to Philadelphia, with an addition of $2,000, if she proceeded to Calcutta; the whole payable on the return of the ship to Philadelphia, and before the discharge of the cargo there,

III. Ch. 103. *Art.* 4. *Con.*

in approved notes of ninety days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and with the consent of the master appointed by the ship owners, entered into an agreement with Palmer & Co., merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading, stipulating for the delivery of the goods purchased therewith, to their agents in Philadelphia *free of freight*, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on Messrs Grants & Stone of Philadelphia, should be accepted, in which event, the said Palmer & Co., should deliver the goods to the charterer, (Hugh Chambers.) The goods were shipped accordingly, and the bill of lading signed by the master, (Rosseter,) with the clause, 'freight for said goods having been settled here.' The bills of exchange drawn by the charterer were refused acceptance, and the agents of Palmer & Co. demanded the goods; these the owners of the ship, (Gracie and others,) refused to deliver, without the payment of freight. The agents paid it in order to get possession of the goods, and then Palmer & Co., (principals,) sued the owners for money had and received, &c. Case stated to be considered as special verdict. Judgment in the circuit court for Palmer & Co., for $10,500: the owners, Gracie, &c., brought error and judgment for them on the ground they had a *lien* on the goods, for the freight, on the general principle, as well as on the terms of charterparty, which could not be varied by the charterer and master. Like the case in 4 Barn. & Ald. 630, Faith *v.* the East India Company, in which, held, that the ship owner could not be divested of his *lien* for freight by such a transaction between the charterer and shipper, who knew the terms of the charterparty. It was contended for Palmer & Co., that the goods were their property: so the property of a *third* person, never liable for the *charter* freight, but at most, for the freight of their own transportation. Admitted, though Hutton *v.* Bragg had been overruled. See ch. 44, a. 3, s. 28; Abbott on shipping 245: and it seemed to be admitted if the goods were the property of Chambers, the charterer, there was a *lien* on them even for the *charter* freight, but urged that if Palmer & Co., were only *mortgagees* of the goods, still as mortgagees *in possession*, they were owners, and Chambers had only an equity of redemption. Webster, for the owners said, 'it was not contended that the particular goods were bound for all the freight of the ship, but considering them as the goods of Messrs Palmer & Co., the claim was for a *pro rata* freight only:' 'that the ship owners retained the *possession* of the ship so as to have a lien for the freight.'

CHAPTER CIV.

COVENANT TO CONVEY LANDS.

§ 11. When a covenant of seisin is broken as to part of the land conveyed, the relative value of that part compared with the consideration paid for the whole, furnishes a rule of damages. If a deed describe the premises as containing two hundred acres by measure, this does not amount to a covenant they shall contain two hundred acres. A covenant against incumbrances is not broken by a mortgage on land the covenantee is bound to pay. Covenant for rent cannot be sustained against a person, without some proof of some privity of contract.

2 N. H. Rep. 175, Ela v. Card & al. p. 287. p. 458. p. 387.

§ 2 *con.* How a *recorded* deed may extend the seisin of the grantee entering under it. Where one takes a deed of a tract of land well bounded in it, and enters on a part, he gains possession, in law, only of that part, for of that part can others or the public see his possession and seisin. But when he *records* his deed and enters his deed, there is a *public* record, that gives notice to all of the extent and nature of his claim and possession; 2 Greenl. 176, 178, 275, 298; and below.

ART. 3. *Con.*

The statute of Maine 1821, ch. 62, s. 6, was enacted to abolish the common law distinction between a possession under a *recorded* deed, and one *not* recorded; attaching the same legal effects to both deeds, as against the demandant this section is *constitutional*, as it impairs vested rights, so far as it is *retrospective.* Says Mellen, C. J., 2 Greenl, 257, this section 'appears to have been enacted with a view, and for the purpose of abolishing the distinction well known to have then existed between possession *under a claim of title on record*, and a possession without any such claim or pretence of title.' As to these distinctions many cases may be found in this work to establish them; and especially in this and ch. 178.

§ 3. But a tenant for a year may hold over pay rent to a stranger, and refuse to quit, and yet not so disseise the lessor, as to prevent his conveyance of the land to a third person. The grantor, Porter, sued to recover the land, thinking he was dessiesed. When he, (Porter,) made his deed to Grant, the demandant counted on his own seisin and desseisin by Hammond, who 'pleaded in bar, that the demandant being seised of the premises, by his deed of Feb. 10, 1821, bargained, sold, and conveyed the same to one William Grant in fee.' The demandant replied, that at the time of making that deed he was deseised of the premises by one Henry H. Snow, and traversed his own seisin, on which issue was taken. To support this issue, the demandant, on his part, proved, that in Feb. 1821, the tenant being in the occupation of the land, paid rent there-

fore to Snow. The tenant proved a lease in writing, that expired Jan. 1, 1820. McGaw, Porter's attorney, testified, after the lease expired, he often called on the tenant to quit, and he refused, and continued possession when this action was brought. Held, he was but tenant at *sufferance* to Porter, who was nonsuited. It may be observed, the defence pleaded was, that the demandant had parted with his title to a third person; 3 Greenl. 188–190, Porter *v.* Hammond: see Atkyns *v.* Horde, ch. 178, a. 14, s. 12; Blunden *v.* Baugh, ch. 133, a. 2, s. 20, 1 Cruise. 272, 273; Pray *v.* Pierce, ch. 92, a. 2, s. 7; 1 Murph. 114.

Adverse possession defeats the deed and warranty in it: as a deed made in Kentucky before the act of 1798, with warranty conveying land to the *adverse* possession of another. Held, this was void, and the warranty was no estoppel to the heirs of the grantor.

1 Marsh. 494.

6 Cowen, 677–681, Jackson *v.* Vermelyea.

§ 9 *con. Adverse possession.* Ejectment for twentyfive acres of land, including a grist mill, a lease of a tract of land, and the lessee's actual possession of a part, with a claim of title to the whole, constitutes an *adverse* possession of the whole, and no other person can convey any part of it, even with an adjoining tract not so possessed: 2. A mill site reserved reserves the soil, pond, and sufficient adjacent land for the use of the mill.

1 N. H. Rep. 9–13, Tomson *v.* Ward.

§ 13 *con.* A gave a deed of land to B, and before it was recorded it was accidentally burnt, and the parties to it agreed to consider it as given up and cancelled, with intent to revest the estate in A. Held, as between A and B, and as to all subsequent claimants under them, this operated as a reconveyance and revested the estate in A, then no other person having acquired a right in the land under B. The New Hampshire act of February 10, 1791, sect. 1, enacted that no title to real estate greater than an estate at will shall be passed but by some instrument in writing. By this the estate could not repass from B to A but by such instrument; but it seems this act was worded as was the province act, which anciently received the above construction, and in conformity thereto the court construed the act of 1791, not saying how, otherwise, they would have construed it.

Second purchaser. See ch. 109, a. 10, s. 4.

§ 26 *con.* 2 Greenl. 176–178, Little *v.* Magquier, held, an entry on land under a deed *recorded*, and paying taxes, is no evidence of a disseisin of the true owner unless the person who entered *has continued openly to occupy and improve it:* 2. Though the deed may not convey the legal estate, yet the possession of a part, claiming all by the bounds expressed in the deed, *may* be considered as *possession* of all, and as a

disseisin of the true owner of the whole tract. Was trespass for cutting and carrying away trees, between February 8, 1814, and February 8, 1820. Pleas. 1. General issue: 2. That the soil and freehold in lot numbered fiftyseven was in Robert Waterman: 3. That the soil and freehold was in Robert Snell and the heirs of Edmund Magquier, which were traversed and issues thereon. To constitute *a disseisin*, the disseisor's possession must have been *adverse to the true owner's title*, as well as open, notorious, and exclusive: 2. The *parol* declarations of a person in possession of land are admissible to show the character and intent of such possession, notwithstanding the statute of frauds. Was trespass *quare clausum fregit*, tried on the general issue. See also 2 Greenl. 275–298, Kennebec Proprietors *v.* Laboree & al. same principle. The grantee enters under a *recorded* deed on *part* and openly occupies, &c. he gains possession of all in the deed, though the grantor had no legal title; for the *record* shows the whole lands.

2 Greenl. 242-249, Little *v.* Libby.

§ 28 *con.* If A be disseised and then grant to B, and he enters, he is a trespasser; and having gained possession by his own wrong, he cannot use his deed to render his continuance in possession lawful. This is void *ab initio:* also when one is *actually* and *not colorably* disseised of lands and dies, they are not liable for the payment of his debts. 2 Greenl. 312.

1 Greenl. 238—247, Hathorne *v.* Haines.

§ 3 *con.* Unless the adverse possession of a part be by *actual inclosure* or *exclusive* possession, possession of part is of all. 1 Har. & Mc H. 521, 523, Smith's lessee *v.* Smith, &c. Principle holds as to goods, hence if they be sold to two different persons, by conveyances equally valid, he who first legally gets possession will hold them.

ART. 4. C

17 Mass. R. 110-116.

§ 14. A possessory right is never to be presumed so as to defeat a legal conveyance, but must be actually proved. 1 Nott & Mc Cord, 380: possession of part is possession of all the land covered by a party's title, nor will a river running through the whole tract sever the possession; and 1 Nott & Mc Cord, 356, where the plt. has *title* to the land, an entry gives sufficient possession to maintain trespass *quare clausum fregit;* but where he does not rely on *title*, but on *possession* only, there the possession must be a *possessio pedis.*

1 Bay. 487.

1 Hawks, 485. Possession alone is enough to maintain trespass against a wrongdoer. *Adverse* possession, ch. 178, a. 14, s. 25.

§ 15. What *adverse possession avails or not.* To constitute *adverse* possession of land, an entry under a claim of title, is in general sufficient, and it is not material whether the title prove to be valid or not: 2. But if the claim is not founded

Jackson *v.* Campb. 1 Cowen, 605—613.

Vol. IV. Ch. 104. *Art.* 4. *Con.*

on a deed of conveyance or a writing, the possession is limited to actual occupancy and substantial enclosure, which must be definite and notorious: 3. To support *constructive* possession *beyond* these, grounded on actual occupation of part only, it is essential the writing relied on as evidence of title include the land not occupied: 4. If one contract for a deed on condition, and enter into possession of the land described, he does not hold *adversely* till he performs the condition for his possession is not hostile *ab initio*: 5. To bar a right of entry a possession must not only be hostile in its inception but must continue so for twenty years: 6. Where one contracts for a deed afterwards executed, this extinguishes all claim under the contract, though the deed vary from it, the contract becomes a nullity: 7. The extent of the *adverse* possession must be determined by the *deed alone*: 8. Any monument, as a river, or spring, or even a marked tree, controls both course and distance. This case is a good summary of many other cases. See Boundaries, Ejectment, Possession, &c. in the Index.

§ 16. *The effect of a quitclaim, deed of.* One having *only possession* passes only a possessory title: 2. If the grantor afterwards acquires the absolute title it does not inure to the grantee's benefit: 3. *Secus*, if a deed *with warranty*, as this estops: 4. A, in possession, claiming title, and has no other right, conveys by quitclaim deed to B, he enters and improves a part, claiming all—A remaining in the possession of the residue—this is B's possession, and B may have ejectment against A, or any one in by after possession, without title, &c.: 5. A and B, adjoining owners of land, agree on a division line between them, and hold and occupy accordingly for twentynine or thirty years, they are bound by it, though it is not according to their title: 6. The grantor in a quitclaim deed is a competent witness for the grantee in ejectment brought by him for the land conveyed: 7. A quitclaim deed operates only as does a *release*, that is, to convey what the grantor or releasor has. See Release, chapters 86, 110, 167, 178.

Jackson v. Hubble, 1 Cowen, 618—622.

CHAPTER CV.

COVENANTS THAT RUN WITH THE LAND, &c.

Art. 1. *Con.*

§ 38. Action of covenant on a lease dated February 4, 1799, by which Anderson, as lessor, leased to one Warner, his executors, administrators, and *assigns*, a dwelling house and lot in the city of New York, *habendum* to him and

Lamett and others, ex'rs. v. Anderson.

them from May 1, 1799, for the term of twentyone years at a rent of $165. Warner, for himself, his executors, administrators, and assigns, covenanted peaceably, &c. at the end of the term to surrender, &c. to Anderson, &c. the demised lot, 'together with all such *buildings* and *improvements* as might be then remaining thereon,' Warner, &c. paying rent, &c., and Anderson, the lessor, his, &c. paying for such of the said *buildings* and *improvements* as might be erected and made thereon by Warner, his executors, administrators, or assigns, *in the manner thereinafter mentioned*. 'The parties then mutually covenanted and agreed, for themselves severally and for their several respective heirs, executors, administrators, and assigns, that it should be lawful for Warner, his executors, administrators, and assigns, at his and their proper costs and charges, during the term, to take down the dwelling house, standing on the demised lot, at the date of the lease, and erect thereon such buildings as he, his executors, administrators, or assigns, might think proper; that all such buildings and improvements as should be so erected and made, and remaining on the demised lot, at the end of the term, should then be valued and appraised by indifferent persons, one of whom should be chosen by each of the parties, or by their respective *legal representatives;* and in case the two persons could not agree in the appraisement, then they should choose a third indifferent person, and such three persons, or any two of them, should make the appraisement in writing, under their hands and seals; and that thereupon the defendant (Anderson,) his heirs, or assigns, should pay to Warner, his executors, administrators, or *assigns*, the amount of the valuation, provided that such amount should not, on any account, exceed $1500.' On these facts the court held, 1. That this was neither a *building* or *repairing* lease: 2. That the covenant to pay extended to a new building to be erected at the option of the tenant: 3. That though the old house was not taken down, and a new one erected, yet the lessor was liable to pay for such additions to, and alterations, of the old house, as amounted to *improvements*. Not, however, to ordinary repairs, such as new roofing the old house, or rebuilding the chimney. The term was passed by mesne assignments to Lamitte. He died, and his executors brought an action on Anderson's covenant to pay for the *improvements*, and the main question of difficulty was if these covenants pass with the land so that an assignee or his executors, &c. could sue on them in their own names: held, 2. The covenant *run with the land*, the term, which having passed to Lamitte by assignment, before the covenant was broken, carried the cove-

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nant to Lamitte, who, or whose executors might maintain an action on it, in his or their own names. The *improvements* sued for were additions, &c. to the *old* house, &c. made by Warner. Verdict was for the pltf. Against the action was cited Spencer's case, 5 Co. 16, 17, cited sect. 10, this article. Cited on the ground the covenant of Anderson extended only to a new house *to be* built. One objection, the word *assigns* was not always used. Cited also, by Anderson's counsel, Shep. Touch. 176; 1 Saund. 241, and notes; 2 Selw. N. P. 426, and cases there cited. On the ground the term had expired and the premises being surrendered, cited 5 Cowen, 407; 10 John. 424. In support of the action it was said the covenant extended to *improving the old house*, and did not become a *chose* in action till the term was assigned to L. The court, holding the action maintainable, said Spencer's case was not in point, as in that the *assignee* was not named in the covenant to build the new wall and an *assignee* was sued. Cited also Com. Dig. Covenant (B 3.) 2. Court held, the tenant, on a true construction of the covenants, had his election to build or to add to the old house, so as to make it more convenient, but included not ordinary repairs, as they were not mentioned and the words *buildings* or *improvements* do not include them.

CHAPTER CVI.

COVENANTS BINDING ON HEIRS, EXECUTORS, ADMINISTRATORS, WIVES, ASSIGNEES, &c.

As to executors of assignees, see Lamitte and others *v.* Anderson, ch. 105, a. 1, s. 38. These kinds of cases of covenants running with the land or not, have become extremely rare in England as well as in the United States, yet a single and rare case shows how important it is to preserve the old law on the subject.

CHAPTER CVII.

COVENANTS, JOINT AND SEVERAL.

Art. 1. Con.

§ 14. *Tearing off the seal by fraud, &c.* Debt on bond. Held, if an obligee tear off the seal, or cancel a bond, in consequence of the fraud of the obligor practised by him, the obligee may declare on such mutilated bond, as the deed of the party, and state the special facts in the profers: 2. A court of law has concurrent jurisdiction with a court of equity

to sustain a suit to enforce such a bond. The first count alleged the deft. on ——, at ——, by his certain writing obligatory sealed with his seal, and which said writing obligatory the plts. produce to the court here, in a mutilated state, and cannot otherwise produce the same by reason that a part of the condition here underwritten, and the signature and seal of the said Spaulding have been torn from the same and destroyed by the collector of the port of B, occasioned by the production to him of a false and fraudulent certificate then supposed by him to be true, purporting that the merchandize specified in said condition had been delivered at a port, or place, without the limits of the United States, at the island of St Thomas, acknowledged himself to be held and firmly bound to the United States in the sum ——, so in common form. See the word *Seal* in the Index, so words *Non est factum*; Read *v.* Brockman; Bolton *v.* Carlisle, in the Table of Cases. This count, though good in substance, was, on special demurrer to it, amended. See ch. 144, a. 9, s. 4; 6 John. Ch. R. 242.

2 Mason, 478, U. States *v.* Spaulding.

If both parties lodge their deed with A, and he tears off the seal, this does not vacate or destroy it, but an action of covenant still lies on it: 2. If a stranger tear off the seal, this will not vitiate it. A tore off the seal, by mistake, supposing the agreement was fully paid when in fact it was not, but $500 remained due on it, so found by the jury.

6 Cowen, 746-751.

CHAPTER CVIII.

MASSACHUSETTS STATUTES.

§ 3. *Towns in New York.* Held, towns in New York are bodies politic of special character and limited powers, and as such, can hold property: 2. The town can regulate only the *common* land held in its *corporate* capacity: 3. Only those within the town: 4. Its title to land is subject to State legislation: 5. No right of property is violated by the decision of a town: 6. Hempstead had power to hold lands by patents from early governors of the colony, and these constituted the inhabitants a body politic and corporate: 7. The division of Hempstead into two new towns, assigned to each the town lands lying within its limits: 8. This division was a partition of the common land, in fact, as well as in title. Chancellor Kent thought all the lands remained to Hempstead. This is the principle in Massachusetts; the court of errors held otherwise, that the inhabitants of the two towns held them in common.

1 Hop. Ch. R. 288—300, the town of North Hempstead *v.* the town of Hempstead.

2 Johns. Ch. R. 320, Denton & al. *v.* Jackson.

Towns in New York, says the Chancellor, 'are little repub-

lics, recognized by the constitution, defined by the laws, and invested with important powers.' 'Their powers are exercised, and their municipal concerns are administered by town-meetings and town-officers.'

§ 15 *con.* Titles to lands made by Indian tribes, or nations, cannot be admitted in the courts of this country. Same principle as to lands northwest of the Ohio, deeded by Indian tribes, or nations, to private individuals in the years 1773 and 1775; not to be admitted in the Courts of the United States. In this case the court held the European governments asserted the exclusive right of granting the soil to individuals, subject only to the Indian right of occupancy—that this was the practice of Spain, France, England, and Holland; each resting on the rights and title given by *discovery*. To Cabot's discovery in 1498, the English trace their title to all English territories in North America, this discovery being made under the authority of the king of England, granted in 1496. The commission asserted the right to take possession, notwithstanding Indian occupancy, but acknowledged the prior *christian* possessions and discoveries. The United States have adopted the same principles. By the treaty of peace of 1783, 'the powers of government, and the right of soil, which had previously been in Great Britian, passed definitively to the United States.' Vast portions of the land were occupied by the Indians. The right was complete, subject to this occupancy, and in 1779, Virginia passed an act, declaring her 'exclusive right of preemption from the Indians of all lands within the limits of her chartered territory,' and asserting the government *alone* had and ever had had the right to purchase of the Indians, &c. This principle ever has been universal, with a few exceptions. So several States ceded to the United States jurisdiction and soil in and over vast territory, then claimed and occupied by Indians; yet the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted,' and 'the exclusive right of the British government to the lands occopied by the Indians has passed to that of the United States.' The same principle as to Louisiana and the Floridas. The Indian occupancy does not prevent a State having *a seisin in fee*. But the Indian 'right of possession has never been questioned.'

8 Wheat. 543–605, Johnson & Graham's lessee v. Mc Intosh.

Fletcher v. Pick.

New York. Held, the Indian tribes within the State, are subject to it. Same point in the same case. 20 Johns. R. 693, in error. Same case in error, a patent for lands to J. S. an *Oneida Indian, and to his heirs and assigns forever*, is to him and his *Indian* heirs, whether *aliens* or *citizens*. Such a patent is presumed to have been issued by proper authority, and as equivalent to a legislative grant to J. S. and his *Indian* heirs. Same case in error; the Indians within New York are not citi-

Jackson v. Goodell, 20 Johns. R. 188.

zens, but distinct tribes or nations, living under the protection of the government. But before decided differently. 20 Johns. R. 188.

§ 1 *con.* The acts of the legislature passed during the revolution confiscating the property of refugees, are valid under the present constitution of New Hampshire. 2 N. H. Rep. 31–36.

§ 5. The act of Pennsylvania of 1779, for vesting the estates of the late proprietaries of Pennsylvania, in the Commonwealth, did not confiscate lands of the proprietaries, which were within the lines of manors; nor were the same confiscated by the act of 1781, for establishing a land office: 2. The statute of limitations of Pennsylvania, of 1795, is inapplicable to an action of ejectment, brought to enforce the unpaid purchase money, for lands of the proprietaries, within the manors for which warrants had issued, nor is the act of limitations of 1705 a bar to such action.

9 Wheat. 241–321, Kirk & others, plts. in error v. Smith, ex dem. Pennsylvania.

ART. 5. *Con.*

§ 1 *con.* As to the wife's releasing her right of dower. See dower, ch. 130, a. 4, s. 12.

§ 24. Mass. Act, 1821, ch. 85, s. 1, provides that when any mortgagor, &c. shall bring his bill in equity for the redemption of the land mortgaged within three years, next after the mortgagee, &c. shall have obtained actual possession thereof, for condition broken, and, 'shall, in his bill, offer to pay such sum as shall be found justly and equitably due, or to perform such other condition, as the case may require, such offer shall have the like force and effect as a tender of payment, or performance made before the commencement of the suit; and the bill shall be sustained without any proof of such previous tender, provided the mortgagee, or those claiming under him, shall on request, have refused or neglected truely to state his or their account, or the sums due on said mortgage, before the commencement of such suit, and in such case no costs shall be awarded against the mortgagee, &c. unless it shall appear he has unreasonably refused or neglected to render a just and true account, when thereto requested, of the money due,' &c. There must be a demand on the mortgagee to render an account and a refusal to account, and the demand must be so made as to time and place, as that he may have an opportunity to render his account; and, p. 546, was no such refusal.

2 Pick. R. 540 545, Willard v. Fiske.

Fay v. Valentine.

§ 25. Where the complainant agreed to sell goods for the deft. for four years, for half profits, and the deft. agreed to board and clothe him out of the goods, the plt. did the business accordingly; and at the end of the term the deft. possessed himself of the books and papers of the concern, and detained them from the plt. Held, on his bill in chancery, that if the plt. was not a partner of the deft., he had, at least, a joint interest in the

4 Pick. 75–77.

Ferry v. Henry.

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books and papers; so was entitled under stat. 1823, ch. 140, to a remedy in equity against the deft.

§ 26. And, 4 Pick. 78–83, Chandler & al. *v.* Chandler & al. another case in equity within said stat. 1823, c. 140, between partners. The bill was to compel a settlement of accounts after the partnership was dissolved. See ch. 52, s. 1.

4 Pick. 234–236.

A bill of discovery cannot be supported where there is no written evidence to prove the trust.

4 Pick. 507–516, Jones *v.* Boston Mill Corporation.

Held, in relation to the subjects over which, by Statute 1817, ch. 87, this court has chancery jurisdiction, its power is general and co-extensive with that exercised by the Court of Chancery in England, so far as is consistent with the constitution and laws of the Commonwealth: 2. The court may make a decree against a corporation, and enforce it by a sequestration or other process, which may become necessary: 3. A bill in equity lies to compel the specific performance of an award made pursuant to a voluntary submission of the parties in *writing*, though not acquiesced in by them: 4. An award that a party shall execute a release of real estate, is a proper subject for a bill for specific performance, there being in such case no adequate and complete remedy at law.

§ 25. Massachusetts act, Jan 26, 1818, provides, 'that when any complaint, bill or suit in equity shall be pending in the supreme judicial court, in any county in which any decree, order, or injunction shall have been made or passed, it shall be lawful for any justice of said court, as well in vacation as in term time, to issue all such writs and processes, as may be necessary to carry into full effect, such decree, order, or injunction.

CHAPTER CIX.

MODES OF CONVEYING LANDS, &c.

Art. 3. *Con.*

Franchot *v.* Leach, 5 Cowen, 506–508.

§ 5 *con.* Covenant on an agreement, dated April 5, 1824, by which the plt. agreed to sell to the deft. a lot of land, for $300, and to execute a deed by July 1, 1824, in consideration whereof, the deft. agreed then to pay $100, and give a bond and mortgage for the balance. A few minutes after executing the agreement, the parties agreed, by *parol*, that the office of B and B, &c., should be the place of performance. Late in June, the plt's. attorney told the deft. the plt., July 1, would be at the office to perform, &c. Deft. replied, it would be of no use, for he should not perform, alleging there was not water on the lot sufficient for a distillery. The plt. attended at the place on the appointed day, with a deed according to the *parol* agreement: but

the deft. did not attend. A few days after the plt's. attorney offered the deed to the deft., but he refused to receive it. On these facts, decided for the plt.: 1. Said the court, the *delivery* of the deed was a condition precedent to the payment of the money; (quere, if not concurrent:) 2. but for the *parol* agreement, the plt. must have sought the deft., and offered him the deed: 3 Clear, a *written* contract cannot be contradicted by *parol*: 4. All which passes between parties previous to a writing, is merged in it. 5. In this agreement, no place was named for to perform it: 6. Clearly it was competent to the deft. at any time after the execution of the agreement, to designate the place where the business should be done: 7. Doubtful if a tender of the deed was necessary, after the deft. said he should not perform: 8. The defence (no such stream as the plt. represented) was well excluded, said the court, on the authority of Dorr *v.* Munsell, 13 Johns. 430. Then the plea was, the plt. obtained the bond fraudulently, by falsely representing himself as the inventor and patentee of an improvement, averred to be untrue: plea held bad: (2 Johns. 177,) 'where it is decided that a fraudulent representation of the quality and value of the thing sold, forms no defence in a suit on a *spaciality*. The fraud which avoids a *deed*, is not a fraudnlent representation as to the *consideration*, but a fraud relating to the execution of it, as a fraudulent misreading, or obtaining such an instrument as the obligor did not intend to give.' It is fully settled a *speciality per se*, implies a valuable consideration. See ch. 62, as to deceit, &c.; and Champion *v.* White, 5 Cowen, 509–513. Held, also, a covenant cannot be avoided in a court of law, on the ground of a misrepresentation, as to the *consideration*.

§ 7. So the grantor may sue the grantee for a part of the consideration money expressed in the deed to be received; which part the grantee fails to secure by mistake, or to pay; the receipt in the deed is not conclusive. 17 Mass. R. 249–259, Wilkinson *v.* Scott.

§ 18 *con.* In conveying a mill site, falls, privileges, &c., 'exclusive of the grist mill now on said falls, with the right of maintaining the same,' the *reservation* secures to the grantor no right to the soil, but only a right to the use of the mill then standing, so long as it is kept in repair. As an exception operates by way of restriction on the general language of the grant, if it be in ambiguous language, must not be enlarged by construction, but be construed strictly. The same rule of law applies to a reservation.

3 Greenl. 471–473.

§ 1 *con.* But the *habendum* may be limited, as 5 Barn. & Cres. 709–720, Goodtitle *v.* Gibbs; ejectment &c. Martha Hutton by lease and release, conveyed real estate to John Westbrooks, his heirs and assigns, to hold to him, his heirs &c.

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from, and after her death, to, for, and upon the uses, and intents, and purposes therein after mentioned. Held, by the premises, an immediate estate of freehold was given to John Westbrooks, and that the *habendum* had not the effect of making the deed void, as giving a freehold *in futuro*. On the whole, when the premises fix the estate in certainty, they are the governing and operating part of the deed: see also Carter *v.* Madgwich, 3 Lev. 339; for if an estate be well fixed in the premises, as in fee, in tail, or for life, &c., the deed is good without an *habendum*; and Jarman *v.* Orchard, Skin. 528; Salk. 346.

The *habendum* may lessen, enlarge, explain or qualify, but not contradict the estate granted in the premises. 1 Serg. & R. 375, 380; 16 Johns. R. 382–575.

Art. 6. *Con.*

§ 13. Conveyances on Massachusetts statutes. Implied notice of a prior unregistered deed, to avoid a subsequent deed or attachment, must be not merely a probable, but a necessary and unquestionable inference, from the facts proved. The cases turn on the *dolus malus* of the civil law. Dig. Lib. 4, tit. 3, lex. 2. See ch. 32, a. 1, s. 29; see also ch. 32, a. 6, s. 2, 6, most of the cases; see also, a. 10, s. 5, this chapter, and many other places in it, and in ch. 32. The only doubt in McMechan *v.* Griffing is, if the evidence of notice did not come up to the rule laid down in the case.

3 Pick. R. 149–157, McMechan *v.* Griffing.

§ 14. 4 Pick, 253–257, Cushing *v.* Hurd, Jr., held, 1. A mortgagee may attach and levy on land mortgaged to him for a debt not secured by a mortgage: 2. A and B, creditors of an insolvent debtor, A knowing only that C was *making* a deed to B of C's land, attached it before the deed was recorded, though after it was executed and delivered, the attachment holds against the deed. There, the deed was *only about to be made*, and this fact A knew, so the case is not like Priest *v.* Rice, 1 Pick. 168, but Warden *v.* Adams, 15 Mass. R. 233: cited ch. 112, a. 5, s. 57.

2 M'Cord, 273.

§ 15. To make an unrecorded deed valid against a subsequent purchaser, *explicit notice* must be shown; *presumptive* notice is not sufficient.

Art. 9. *Con.*

§ 2 *con.* But the last proviso follows in 13 Eliz. ch. 5, provided also, and be it enacted, &c., 'that this act, or anything therein contained, shall not extend to any estate, or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be made, conveyed, or assured; which estate or interest, is, or shall be upon good consideration, and *bona fide*, lawfully conveyed or assured, to any person or persons, or bodies politic, or corporate, *not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as aforesaid*, anything before mentioned to the contrary hereof, notwithstanding.'

There is a like proviso in the 27th of Eliz. except the above words understood are omitted for good reasons; for if a conveyance were intended to defraud after purchasers, that intent could not be known to have existed until a sale was actually made by the vendor, to a subsequent purchaser, as if A convey to B, both meaning fraud, and *before* A conveys to any other, B sells to C, a fair purchaser *bona fide*, and for a valuable consideration, now it is clear that C's title is valid, because he purchases without the possibility of knowing the fraud A and B intended. See Sutton *v.* Lord, ch. 32, a. 2, s. 2, Goodale *v.* Nichols, ch. 32, a. 2, s. 1, &c.

If A convey to B, meaning to defraud subsequent purchasers, yet there can be no fraud in fact, until A shall convey to some other, and if he never convey but to B, there never can be any fraud in fact, whatever A or A and B might intend in the conveyance to B. The word *collusion* includes both parties. Whenever the creditor grantee knows the debtor means to *delay*, *hinder* or *defraud* his other creditors, the creditor taking the conveyance, aids the debtor in his fraudulent intentions, and becomes a party to them, and so makes the conveyance to him null and void, and *in toto*, for he shall not so aid, and yet hold the conveyance good for his real advances. See ch. 32, a. 1, s. 23.

§ 4 *con.* 2 Rand. 93–108, Newman *v.* Chapman, held, a subquent purchaser will be affected with notice of a prior mortgage, though not recorded, if he has actual notice of the existence of it; and the fact of notice may be inferred from circumstances, as well as proved by direct evidence: 2. If for valuable consideration, without actual notice, he is not affected by a pending suit to foreclose a mortgage, not duly recorded: 3. *Pendente lite*, or *lis pendens*, a suit pending, is notice to all: but now in chancery *lis pendens* does not exist till service of the *sub pœna* and bill filed: p. 102, and p. 108; a mere *lis pendens* does not affect the conscience, and it is this that makes a second purchase void where *lis pendens* or an unrecorded deed exists. See lien.

4 Pick. 143–165; same principle as to attachment: 1 Pick. 164–169.

§ 4 *con.* They can make partition of undivided lands by vote, and without any instrument under seal; and this under Massachusetts statute 1783, ch. 39; and their vote authorizing a committee to *sell* lands, empowers them also to make deeds in the name of the proprietors. Of the form of the deed. 3 Greenl. 338–340.

Folger *v.* Mitchell, 3 Pick. 396–403.

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CHAPTER CX.

PRINCIPLES OF ENGLISH CONVEYANCES ADOPTED HERE.

§ 9 *con.* A grant of land to the heirs of A, who is living, is void. The deed of A B, in actual possession, referring to such grant, conveys all the title he has. 1 Pick. R. 27–32, Hall *v.* Leonard & al.

Art. 3.
Con.
1 Rand. 406–412.

§ 7. A and B agree to make a lease on certain terms, B, to whom it is to be made, cannot enforce a specific performance, unless he performs his part of the agreement, or offers to perform, or shows he is willing and able to perform: 2. If B, the lessee, owe A, the lessor, a debt, and as collateral security therefor, conveys to him certain lands, and these are lost, being sold for taxes, the loss is B's, as he is bound to see them paid, as his *equitable* title to the lands, is complete.

Harvie, &c., *v.* Banks.
3 Pick. 221–223, Smith *v.* Putnam & al.

§ 20 *con.* The lessee covenanted not to carry any hay from off the farm, on penalty of $10 a ton. His creditor took hay in execution for his debts against his consent: this was no breach of his covenant.

Welden *v.* Harrison, 17 Johns. R. 66.

A lease for seven years, contained the lessee's covenant that he 'should not assign over, or otherwise part with the indenture, or the premises, thereby leased, or any part thereof, and there was a clause of reentry for breach of covenants. The lessee underlet for two years. Held, 1. No forfeiture: 2. One of the conditions of a lease was, that the lessee should pay all *taxes*, &c. Held, the lessor had no right to enter for the breach of the condition, without showing a demand of payment of the tax, within the period, required by law in order to create a forfeiture: 3. Nor can the lessor reenter on the ground of forfeiture for the non payment of rent, without showing a demand of the rent due on the last day, from the tenant, on the premises, a convenient time before sun-set, &c., or a strict compliance with all the formalities required by the common law, his claim being regarded *stricti juris*: 4. Proving a demand of the rent of the tenant, at his house, on the premises, in the afternoon of the last day, is sufficient: 5. At the bottom of the lease was a clause of reentry for non performance of covenants, conditions &c. The lessee agreed not to make any alterations in the buildings without the consent of the lessor. Held, this rested merely in covenant, and was not a condition, for the breach of which, the lease was to be forfeited. See also, 18 Johns. R. 174, and p. 447, when the lessor goes for a forfeiture or a penalty, he must prove a demand made, as above. It is a good defence for the tenant, that he was ready on the land to pay, but the lessor was not there ready to receive the rent. If payable off the land, and there is a clause of distress if the rent be in arrear, being lawfully demanded at such place as is appointed, there must be

such a demand to enable the lessor to distrain. If the rent be payable yearly, in wheat, in Albany, at such place there as the lessor shall appoint, and he makes no appointment, it is payable on the land. Vol. IV. Ch. 110. *Art.* 3. *Con.*

§ 34. *Assumpsit* on diverse promise stated in the declaration of the deft. the lessor, such as that there should be a sufficiency of water and of a good quality; but as these promises were made before the lease was, the court held no action could be sustained on them. The lease was a sealed one, and the decision on the common ground that all prior verbal negotiations and promises, are excluded by the agreement being reduced to writing, as being resolved into it. 17 Mass. R. 571.

§ 35. If the lessee attempt to deprive his lessor of the benefit of possession, fraudulently pretending to give it up, he is still lessee, and the lessor may recover possession against him in ejectment; and if A come into possession under the lessee, he has only such rights as the lessee has. But if A accept a lease of a *part* of B's tract of land, A is not estopped to controvert B's title to the remainder of the tract. 5 Serg. & R. 236, Pederick *v.* Searle. 4 Serg. & R. 467.

§ 1. A having seisin in law, but never in actual possession of lands in fee, can convey them by lease and release, for a valuable consideration, where no person has the actual possession at the time of the conveyance. 4 Har. & M'H. 488, Lewis's lessee *v.* Butts. Art. 4. *Con.*

§ 11. A gives a bond to B, conditioned he shall forever peaceably hold and enjoy land conveyed to him by C, will operate as a release of all A's right in the land. 2 Har. & M'H. 121 to 145, Kelly's lessee *v.* Greenfield.

§ 31 *con.* The remainder must come to the remainderman, &c. in its ancient condition. 15 Ves. Jun. 580; 12 East. 455; 13 Ves. Jun. 255. Art. 5. *Con.*

CHAPTER CXI.

CONDITIONS AND DEFEASANCES.

§ 1 *con. Delivery of a deed of defeasance, &c.*, if never delivered to the grantor in a deed, but deposited with a third person to be delivered on a condition the grantor never performed, does not render the deed a mortgage. The defeasance was returned. Art. 2. *Con.* 2 N. H. Rep. 71—75.

§ 2 *con.* A case in 1 Cowen, 199–203, decided on the same principle as Hodges *v.* Smith. Creditor may bind himself to accept a sum less than the true debt, on condition the less sum be paid by a certain day; if not so paid, or tendered, the true debt is recoverable.

VOL. IV. CH. 111. *Art.* 3. *Con.*

§ 8. *So a condition may be void and the estate valid.* As in executing a power, the gift or appointment may be good, and the condition annexed void; as if A be empowered to appoint an estate, and he does it, and adds a condition the appointee release a debt; the estate is valid and condition is void, as it is distinguishable, &c. 2 Ves. 644; 1 Ves. 281; 1 Ball & Beat. 77, Dillon *v.* Dillon.

ART. 4. *Con.*

§ 3 *con. When a condition is to be performed in a reasonable time.* A, by deed, conveyed lands to B, subject to a ground rent, payable to C, and the same day the parties executed an indenture, reciting the deed, and that it was their intent and meaning, and the deed of conveyance was on this condition, and mutual agreement between the parties, that B should indemnify A from all costs and charges by reason of the non payment of the quit rent, due or to become due, and would, also, build a dwelling house on the lot, and suffer A and his wife to reside there during their joint lives, and until it should be built, they were to reside in the old tenement then on the lot. After this, followed covenants of mutual performance. B paid the quit rents, but did not build the dwelling house. A and his wife resided in the old tenement during their lives, and A sometime before his death, conveyed the estate to D. Held, it was *on condition of building*, and that B forfeited the estate by not performing that condition in a convenient or reasonable time, whereby the estate revested in A, without entry to take advantage of the breach of the condition, *as he was in possession*, and without notice of the non performance of the condition. No time of performing the condition being named, on general principles, according to some cases, B had during his life to perform, by building the house, but according to the case of Booth, &c., see ch. 177, a. 9, s. 9, 10, 11, &c., B was to perform in reasonable time; for by *his own* act he could build the house, and to do it, no concurrent act of the parties was necessary. Add further, it was obviously the meaning of the parties, the house should be built in convenient time, in order that A should have all the benefit intended to be secured to him. The only doubt in this is, as to the reentry, for it is stated the estate *revested* in A; this implies he had been devested of it; so living merely in the old house, was not having the estate vested in him; then how *revest* without entry, or doing some act of a nature to revest the land, &c.

Hamilton *v.* Elliott, 5 Serg. & R. 375, cited Wharton's Digest of Penn. Reports, 177.

CHAPTER CXII.

MORTGAGES.

§ 1 *con. Mortgage title by estoppel; the whole sued for; undivided moiety recovered; conditional judgment in mortgage, &c.*

3 Pick. R. 52-63, Thomas Somes, adm'r. of Nehemiah Somes v. John Skinner.

Entry sur disseisin, in which said administrator demanded seisin of a tenement in Boston, counting on the seisin of William S. Skinner, January 8, 1811, and a conveyance by him on that day, to the intestate in fee and mortgage, and alleging his disseisin by the tenant; plea nul disseisin. The demandant rested on said conveyance, recorded Sept. 1812.

In defence, the tenant, John Skinner, produced a deed from his father, John Skinner, to said Wm. S. Skinner, his son, in fee, with warranty, dated December 1804, and recorded in April 1805; also a deed from said W. S. S. to said J. S. dated in March 1805, and recorded in March 1807; also a deed of mortgage from said W. S. S. to Stephen Codman, (who had no notice of said last deed) dated July 1, 1805, and recorded July 10, 1805, in mortgage for $4000. January 8, 1811, Codman, for one dollar consideration, released to the intestate, 'meaning thereby to assign all his right under the mortgage, and possession taken under the same,' and delivered to him the mortgage deed. The same January 8, 1811, the intestate, for one dollar, by deed, released to said W. S. S., and took from him the mortgage deed of January 8, 1811, first above mentioned. During these conveyances, J. S., the father, lived on the premises, till he died in 1813. He left three sons; John, the tenant, said Wm. S., and Richard. He died unmarried, without issue, in August 1817. John, the tenant, entered after his father's death, and urged that, by the deed of release of the intestate, to W. S. S., his father became seised by virtue of the deed of March 1805. Held, 1. The release to W. S. S. did not give him instantaneous seisin, so as to enable him to reconvey an estate; but it operated by estoppel, a discharge of the first mortgage, leaving the father, J. S., an unencumbered fee; but when the land came to W. S. S. and the tenant, by descent, the demandant took the moiety of W. S. S. by estoppel, by virtue of the second mortgage: 2. A deed 'which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor,' not only against him and those claiming under him, but also against

Vol. IV. Ch. 112. *Art.* 1. *Con.*

strangers who come in after the estoppel: 3. One may sue for the whole, and recover a part: 4. On a writ of entry there may be the conditional judgment in mortgage.

See how a mortgagor's judgment creditor, by his judgment, acquires not only a right to reduce, but off-set. See ch. 168.

§ 4 *con.* But the heirs of the mortgagee, merely as such, cannot enter for condition broken, for the debt belongs to the executor or administrator; 'So does the mortgage,' and if the heir, in his count, omit the condition, the mortgagor may show it in his defence, and bar him. The stat. of 1788, ch. 51, makes this matter clear; but if the mortgagee enter for condition broken, and die seised and possessed, his seisin will descend to his heirs. 16 Mass. R. 18–24, Smith & al. *v.* Dyer.

2 Pick. R. 517—520.

§ 8 *con.* If husband and wife mortgage her estate in fee, and the equity is levied on for his debt, and he dies, she may redeem, paying the original debt only. (Case of baron and feme.)

1 Rand, 344—

If the husband mortgage his land before marriage, or after and the wife join, she has dower but in the equity of redemption, and that under the statute of Virginia, and in equity paying her part in the redemption, say one third.

§ 10. 17 Mass. R. 370. The mortgagee has no remedy when it appears the bargain is incomplete. 11 Wheat. 304–309. How incumbrancers must be parties to a bill of foreclosure. See 2 Cowen, 246 to 323, many nice distinctions, and Merger, ch. 114, a. 28, s. 6.

Art. 2. *Con.*

§ 1 *con.* In Maryland, the minor has 20 years after he comes of age, to file his bill to redeem. 3 Har. & M'H. 328.

Merger. A release of the equity of redemption, does not operate by way of *merger* of the estate conveyed by mortgage, but as an extinguishment of the equity of redemption. In November 1794, Charles Harris mortgaged the estate in question to John Harris, for £368, who soon after took possession of part, and he and those claiming under him, kept possession to the time of the action. (Ejectment.) Charles Harris retained possession of the other part till he died, in 1794. In January 1795, his widow and John Harris, took administration, returned an inventory, &c. In 1796, on their petition to the legislature of Rhode Island, stating the personal estate of Charles Harris was insufficient to pay his debts, and that his real estate was under mortgage, &c., the legislature empowered James Aldrich to sell the real estate with the advice of the town council, &c. In March 1797, said Aldrich, with said advice, for $2250 sold to said John Harris in fee, &c. In November 1809, the marshal sold the estate to the plt. to satisfy an execution against John Harris in favor of P. Am-

midon, & Co. for $4550. In February 1812, John Harris, for $100, released, by deed, all his title, &c. to the plt., as did said widow her right of dower. Held, 1, as above, the equity of redemption was extinguished: 2. As Aldrich was the seller, John Harris, though administrator, might legally be the purchaser; see ch. 32, a. 2, s. 2: 3. Nor was the mortgage *merged* in the title acquired by John Harris under the sale from Aldrich. 2 Mason, 531–541, Dexter *v.* Harris.

§ 3. Under stat. 1821, ch. 85, the mortgagor may file his bill to redeem on the mortgagee's refusal to account, and he refuses, if he will render none but an erroneous one. Merger see ch. 114, a. 28, especially s. 6; 2 Cowen, 246–323. 4 Pick. 6–18, Battle *v.* Griffin.

The mortgagee enters for condition broken, and leases to the mortgagor, and *before* foreclosure the mortgagee dies, his administrator must sue to get actual possession on stat. 1788, ch. 51. 4 Pick. 19–21.

Where the mortgagee becomes trustee, &c. As where the mortgage of land is to secure a debt due on a negotiable note, and that is endorsed to a third person, and the mortgage is not assigned, whereby they are separated; the mortgagee becomes in equity the trustee of the holder of the note. The mortgage remains in force, and the endorsee may attach and sell the mortgagor's right to redeem. See a. 7, s. 19, Atkins *v.* Sawyer. Not so the mortgagee. 4 Pick. 131–136, Crane *v.* March.

Held, 1. A mortgage held by a testator before making his will, and till his death, will pass under a residuary devise of 'all his estate, whether real or personal': 2. If a testator, after devising a mortgage forecloses, or take a release of the equity of redemption, it is a revocation of the devise: 3. Where a testator after devising a mortgage, took an absolute deed, cancelling the mortgage and paying the mortgagor the difference between the debt and the value of the land, it is a purchase on which the will does not operate. 5 Pick. 112–119, Ballard *v.* Carter.

§ 8. 20 *years to redeem or foreclose in Kentucky; alien mortgage.* September 1793, James Hughes gave his bond and mortgage for £770, 2*s.* 4*d.* to —— Hughes, now Mrs Edwards; bill filed June 8, 1816, stating the mortgage, &c. object, a sale of the mortgaged premises for payment of the debt, foreclosure, &c.; and several of the defts. had purchased parts of them of the mortgagor, and made improvements. The bill alleged the 'plts. to be *aliens* and subjects of the king of Great Britain;' the mortgage deed was duly recorded. Four objections were made by the defts., Hughes and others, 1. As to a mistake in the date of payment, that is, a day past; court held this was no valid objection in equity: 2d objection, that the plts., the mortgagees, were *aliens* by 9 Wheat. 489–501, Hughes & others appellants *v.* Edwards & wife.

their own statement, and aliens cannot hold lands in Kentucky, so cannot have foreclosure. The court held their *alienage* was no valid objection, for though not in *possession* when the treaty was made in 1794, they then had title. And independent of the treaty they had a right to the mortgaged premises, as *collateral* security for the debt, the principal thing: 3d objection: the plts. were barred by length of time. The court held 20 years barred redemption and foreclosure, generally, but in this case the mortgagor made a payment in 1798, and by letters in 1803, acknowledged the debt and promised payment.

4th objection: the premises mortgaged ought not to be liable beyond their *unimproved* value. The court overruled this objection, and noticed the purchasers of the mortgagor had constructive notice of the mortgage, from the deeds being recorded; equal in this case to direct notice. It was said for the purchasers, that though the mortgagor's letters in 1803, &c. precluded him from objecting length of time, they did not the purchasers. Court answered, they, 'with notice of the incumbrance, purchased,' and though but constructive notice, yet, 'for every purpose essential to the protection of the mortgagees against the effects of those alienations, it is equivalent to a direct notice, and such is, unquestionably, the design of the registration laws of Kentucky.'

§ 12. The English doctrine of tacking, does not apply in Massachusetts. 3 Pick. R. 50.

5 Pick. 146–162, Gibson v. Crehore.

§ 10 *con.* This was a bill in equity to redeem, by the mortgagor's widow. Held, 1. A legal assignment of dower was not necessary to enable her to support her bill: 2. Court has power under the act of 1798, ch. 77, to sustain it: 3. Creditor's prior lien. See Lien, &c.: 4. A purchased the equity of redemption of the mortgagor's administrator and gave him a bond to pay the mortgage debt, and then paid it, and took an assignment of the mortgage—decided the widow, the plt., could take no advantage of this bond by estoppel or otherwise, she not being party to it: 5. A, being in possession under such deed, afterwards makes an entry and holds possession three years, as such assignee of the mortgagee, *without notice to her;* she may redeem: 6. But she must pay the whole debt secured by the mortgage: 7. If A redeems, she is let in, paying her part of the debt according to the value of her life estate in one third part of the mortgaged premises: 8. Motion to vary the minutes of a decree in chancery may be received any time before a final decree is made and recorded: 9. A being in possession, &c. as under the fifth head she may elect to consider him in possession under the mortgage from the

time he took the assignment of it, and hold him to account for the rents and profits from that time: 10. But not for previous rents, &c. is he liable, no demand of dower having been made on him before that time, and the statute 1816, ch. 84, entitling her to rents and profits until her dower be assigned, being to give her a remedy only against her husband's heirs, as it seems: 11. Where the interest is payable half yearly and the rents and profits are considerable, interest is computed on them semiannually and making rests: 12. Such assignee allowed five per cent. commission for his care and trouble in collecting the rents, &c. and managing the estate. March term, 1828, again considered: stated that no such commission is allowed in the English courts.

5 Pick. 259–277, Saunders and Daniel Winship v. Frost.

Bill in equity to redeem lands, brought by subsequent mortgagees, from two prior mortgages, and to compel the prior mortgagee to release the two first mortgages. Facts: April 24, 1821, Joseph Winship gave to the deft. two promissory notes for $300 each, one payable in three years and the other in six, *with interest annually:* June 14, 1821, Jos. Winship made his mortgage to the deft. to secure payment of said notes. February 11, 1822, Jos. Winship made a second mortgage to one Carew, to secure him as a surety on a note given by Jos. Winship to one Pynchon: September, 28, 1824, Carew assigned this mortgage to the deft., who paid the $200 then remaining due to Pynchon: June 16, 1823, Jos. Winship made a third mortgage to Carew and the two plts., to secure him and Dan. Winship, as his sureties on a note he gave to the Hartford bank, and Carew, as his surety on his note to the Springfield bank, and other notes—one to Saunders: September 20, 1825, Carew assigned to the deft., Frost, all his interest in this third mortgage, then all the mortgages vested in the deft. Dan. W. paid part of the note to the Hartford bank, and October 28, 1823, Carew paid the balance, $75; Carew paid all the note to the Springfield bank: May 31, 1826, Jos. Winship conveyed to the plts. all his remaining interest in the mortgaged premises, being his right to redeem: August 5, 1823, the interest on said two first notes made to the deft., being unpaid, he took possession for condition broken, and continued in possession to the time of the commencement of this suit. During that period the rents and profits received by him, exclusive of fifteen dollars lost by an insolvent tenant, amounted to about $206; and the repairs, including insurance against fire and the expense of an aqueduct, amount to about $50: April 26, 1826, the plts. tendered to the deft. $800 to redeem the two first mortgages.

On these facts, held, 1. The two plts. had properly joined in the bill against the deft. to redeem the two first mortgages.

2. The deft. could not be compelled to contribute to pay them off; and if he did not, and the plts. alone redeemed them, he could not avail himself of his third mortgage, but the plts. could hold possession till reimbursed his proportion: 3. If the deft. elected to hold under his third mortgage, he should contribute to redeem the two first, in proportion as his interest in the third bore to the interest of the other two mortgagees: 4. The deft. could not apply the rents and profits to the third mortgage debt, he being in possession only for breach of condition of the first mortgage: 5. There being several conditions, and the mortgagee enters for the breach of one of them, the mortgagor, by tendering performance of that one prevents a foreclosure, and may have a decree for possession, unless the mortgagee, in answer, sets up his general right under the mortgage, or has declared he holds for the breach of another condition in which case a special decree may relieve the mortgagor from the effects of the breach for which the entry was made, and leave the mortgagee in possession of his legal rights: 6. The court has power, under the statute 1798, ch. 77, to decree according to the principles of chancery courts, whatever equity requires between the parties, so is the act: 7. The deft. was not bound to receive principal tendered not due, but was bound to receive the interest due, part of the sum tendered: 8. The deft. was bound to release *quoad* the condition tendered to be performed, so is the statute: 9. The deft. was not chargeable with the quarter rent lost by the tenant's insolvency, the deft. not being guilty of any negligence: 10. Rents received by the deft. were applied, as they accrued, to keep down the interest: 11. Deft. not allowed the insurance, but was for the aqueduct, it being necessary and expense small: 12. A mortgage secures two sums payable at different times; and the mortgagee enters for the nonpayment of the first due, the mortgagor brings his bill to redeem, and when the other falls due he makes a new tender, he must file a supplementary bill and state in it the new tender. As to costs, see Costs, ch. 195, a. 2, s. 5.

5 Pick. 167, Battle *v.* Griffin, in a bill to redeem, was held to account, and it appeared the mortgage debt exceeded the value of the mortgaged premises, the deft. was allowed to set off the plt's. costs *pro tanto* against the mortgage debt.

§ 25. *Creditor may levy on the estate mortgaged;* as where one gets judgment for his debt and extends his execution on land mortgaged for the same debt, and the debtor neglects one year to redeem after the extent, the estate is absolute in the creditor, notwithstanding the mortgage. Decided on the

1 Greenl. 297–300, Porter *v.* King, adm'r.

mortgagor's bill and equity to redeem; and 2 Greenl. 339–340, and if the debtor's right to redeem be sold on execution, to redeem within the year, he must tender to the purchaser the *costs*, as well as the sum for which the equity sold and interest. Demandant was assignee of the purchaser, and the costs were those of the demandant's on an action commenced immediately on the sale. Page 341–347, if the surety pay the mortgagee he may enter, &c. See ch. 169, a. 28; 19 John. 486.

§ 26. The mortgagee may have trespass against the mortgagor in possession for cutting down and carrying away trees, timber, &c. for the value thereof. The plt. sold the land September 15, 1819, to one Bickford in fee, taking a mortgage at the same time, to secure payment of the purchase money, and Bickford's notes payable in two years and a half, $330. He paid one, &c. the next spring. December, 1820, he sold all the timber on the land, to the value of $230, to Pike, &c., all defts., who cut it down and converted it to their own use without the plt's., the mortgagee's, license, Bickford remaining in possession till after the cutting, when the plt. entered for condition broken, the residue of the purchase money being unpaid. Facts agreed. Judgment for the plt., the mortgagee, for the value of the timber and costs.

Stowell *v.* Pike and others, 2 Greenl. 387–390.

§ 3 *con.* And 17 Mass. R. 419–429, Parsons *v.* Wells, &c. *Writ of entry.* Decided a mortgagee of a satisfied mortgage cannot at law recover possession against the mortgagor or persons claiming under him. By the law of the State of Maine, the satisfaction was specially pleaded. The mortgage was not discharged in the registry of deeds, nor by a release. Decided on the statute of Maine, 1821, ch. 39. The action was not on the mortgage. See statute of Massachusetts 1821, ch. 85.

ART. 3. *Con.*

3 Mason, 520–532, Gray *v.* Jenks & al.

§ 27. *Bill in equity to redeem.* If the legal and equitable estates unite in the mortgagee, the mortgage will be considered as subsisting or not, according to his intention, actual or presumed: 2. After a bill is brought to redeem, the court will not permit the officer, who executed the writ of *habere facias* under which the mortgagee entered, to amend his return, by stating an earlier day of service for the purpose of foreclosure. As to the *merger* of the mortgage title, see ch. 114, a. 28, s. 12.

3 Greenl. 260–269, Freeman *v.* Paul, a dep. sher.

§ 28. *No merger.* Equity of redemption on execution, afterwards the mortgagee entered under a judgment and writ of possession for condition broken, and before foreclosure conveyed all his interest in the land to the mortgagor. Held, that as against the purchaser of the said equity, this should

[redacted]

operate as an assignment and not as an extinguishment of the mortgage. If the mortgagor remain seised of right to redeem and the mortgagee release all his interest to him, this *extinguishes* the mortgage, but *after* the right to redeem is vested in a *third* person, the mortgagee's release to the mortgagor operates as an *assignment* of the mortgage, as the mortgagor in such case has no estate in which the mortgage can merge; and the case is the same if the mortgagor has the right to redeem the equity of redemption sold on execution.

§ 29. *The mortgagee's power to sell, in New York, and forclose the right to redeem.* Sarah Wilson and others, appellants, and heirs of William Wilson *v.* Robert Troup and others, respondents, 2 Cowen, 193–242. Appeal from the court of chancery to the court of errors, on the mortgagor's bill to redeem. Facts in substance: the statute of New York, (1 R. L. 372,) respecting mortgages, recognises, as below, the mortgagee may have power to sell, and such power had been usually given in New York: Sir William Pultney purchased, in that State, a large tract of land, and opened a land office. Charles Williamson was for a time his agent to manage and sell—succeeded by said Troup, and also he became Pultney's administrator, on his death, in 1805. Previous to October, 1796, said Williamson covenanted to sell and convey to said W. Wilson, living in Pennsylvania, six thousand acres, part of said land, for £795, New York currency, and for this sum to take a bond and mortgage. Oct. 6, 1796, said Wilson gave a power of attorney, in the form below, to take said conveyance and give said bond and mortgage to Daniel Faulkner. He did accordingly, but in the mortgage to Williamson (Oct. 21, 1796,) F. inserted a special power to sell the land and raise the money due, in default of the mortgagor, &c., to pay, &c. Statutes of New York gave the mortgagee, his assigns, &c. power to foreclose in a summary way without a bill in equity. Williamson assigned this mortgage to Pultney. It was the practice, also, of the Pultney land office for the mortgagor to insert in his mortgage deed the usual power to sell. The mortgage was recorded October 27, 1796, but not the power to F, though that was recorded before the sale. Mr Cowen, in his report, leads the reader to think from thirty to fifty questions (or points) were made and decided; but Sutherland, J. correctly made but four: 1. Had Faulkner authority to insert, as he did, said power to sell? 2. Was F's. power of attorney legally recorded before the sale under the mortgage? 3. As the mortgagee or his assignees had sold parts of the mortgaged premises in fee, with warranty, before the foreclosure could there be an after foreclosure under the power?

4. Could Troup be a legal purchaser at the foreclosure? The general question was, if the sale was legal and so the *equity of redemption* legally foreclosed. The chancellor held it was, and his decree was unanimously affirmed in the court of errors. As to the first question the power to Faulkner authorized him to receive a deed from Williamson, and to sign, &c. to him a mortgage and bond for the consideration money, 'and to do and perform all things necessary and lawful to the obtaining a title to the said land, and securing the consideration money therefor, to the said Williamson.' Sutherland, J. clearly showed by reasons given and authorities cited, that this power, in connexion with the law and usage of the State and the Pultney land office, authorized Faulkner to insert in the mortgage the power to sell. This was the main question, and stated a power must be construed according to the intentions of the parties. These may be learnt from extraneous circumstances, these be proved by the laws and writings in the case and *parol* evidence under the known limitations. Authorities, Sugden on Powers, 459; 1 Br. Ch. C. 395; 7 Ves. Jr. 547; Doug. 292; 2 Ves. Jr. 336; Skinner, 27; 1 Coke, 175, a. &c. 2. Recording the power. Savage, C. J. gave a correct opinion, saying it was recorded before the sale first then correctly proved and again recorded. Referred to Bergen *v.* Bennett, 1 Caines Cas., in error, 17, where decided that the omission to record the power will not affect the proceedings as between the mortgagor and the mortgagee. The recording is for the purchaser's benefit. Third question: sale of part in fee previous to the foreclosure. Sutherland, J. well observed, the mortgagee, or his assignee, retained the debt and the power to sell each entire, and the power being indivisible, and the said right to foreclose was subject to the sales previously made and operated for the benefit of the purchasers, and as they were not assignees under the mortgage, it was not necessary they should be made parties to the foreclosure. Fourth point: Troup's power to purchase was truly answered in a few words. The mortgagee may purchase under a power, though he had conveyed a part, for the 10th section of the act concerning mortgages, (1 R. L. 375,) provides 'that no title to mortgaged premises, derived from any sale made in virtue of a special power, shall be questioned, or impeached, or defeated, either at law, or in equity, by reason that the mortgaged premises were purchased *in by the mortgagee, or his, or her, assignee,* (or assignees,) *or for his, her, or their benefit, or account.*' The mortgagee's grantees are assignees *pro tanto*. Trustee may purchase for the benefit of his *cestui que trust*, and he only can question the purchase,

Vol. IV. Ch. 112. *Art.* 4. *Con.*

No pretence of fraud. No abandonment by Wilson. Troup, as administrator had a right to foreclose generally.

§ 6. And if he do not redeem in the year, his whole interest is gone, so that he cannot redeem the land of the mortgagee, even if the purchaser of the equity should not redeem. 2 Pick. R. 276–281.

3 Pick. R. 48–51, Loring, in equity, *v.* Cooke.

But when the right to redeem is sold on execution to a creditor of the mortgagor he has a right to redeem such right on repaying the purchase money and interest only; and a tender of the purchase money must be unconditional.

Art. 5. *Con.*

§ 2 *con.* The first mortgagee filed a bill to forclose against the mortgagor and second mortgagee, and the *affidavits* in support of it, stated that the land without the timber was an insufficient security, and that the timber was not in a fit state to be cut down. The mortgagor was in possession. On motion of the counsel of the first mortgagee, the injunction was granted as prayed for. So held, it may be extended to restrain cutting down underwood, contrary to the usual course of husbandry, but not to underwood generally, though the mortgagor is insolvent. Cited, 8 Ves. 105; 1 Dick. 75; 3 Atk. 723, [and Brady *v.* Waldron, 2 Johns. Ch. R. 148.] On the statute the mortgagee may, in selling to foreclose, be the purchaser, having a power to sell them, his title is valid, without a deed for being the seller, he cannot give a deed to himself. The act allowed him to purchase.

1 Jacob. & W. 561—562, Humphreys *v.* Harrison.

Jackson *v.* Colden, 4 Cowen, 266—282.

§ 3. The principle in Ivers *v.* Hooper, Pike *v.* Greenleaf, adopted; 2 Greenl. 132–138, Blaney *v.* Bearce.

2 Greenl. 322–334, Vose *v.* Handy.

The assignment of a mortgage must be by *deed*, but a bond may be assigned by *delivery* only, for a *full and valuable consideration*: 2. Where several particulars are named, descriptive of the land intended to be conveyed in a deed; if some are false or inconsistent, and the true are sufficient to designate the land, the former are rejected: 3. If the mortgage debt be paid, the mortgagee cannot recover possession. See ch. 101, a. 5, s. 27, Maine Stat. 1821, ch. 60, s. 14–15, authorized a *bank's mortgaged interest*, a debt due to it, to be seized and sold on execution for its debt, but not *after* the debt due to it is paid, though the mortgage remains not assigned by it by deed, and not discharged on record.

1 N. H. Rep. 93—42, Lund *v.* Lund. pp. 169—172.

pp. 332—336.

But the bond, if made afterwards, and not the same day, does not constitute a mortgage, though agreed for the same day. But otherwise in chancery. The mortgagee may enter immediately after taking our common mortgage deed, and put out the mortgagor, being but a tenant at sufferance. By the statutes of New Hampshire, of Feb. 16, 1791, and Jan. 16, 1795, the debt may be tendered any time before foreclosure, and after condition broken; and such tender operates as payment or ten-

der at the day. *Quere*, if the tender be not limited to one year after the mortgagee has entered.

§ 7 *con.* This was a bill in equity to redeem certain mortgaged premises. Held, it cannot be maintained by the mortgagor, without averring and proving a tender of the sum actually due. This he must ascertain at his peril, unless it appears the rents and profits exceed the sum due on the mortgage. The court said it 'has no jurisdiction in equity, except what is expressly given by statutes. We cannot entertain a bill of discovery, except in case of *trust created by deed or will.*'

17 Mass. R. 117-122, Terrill v. Merrill.

But, 4 Pick. 216–219, Reed *v.* Davis & al. held, that an entry by a mortgagee before condition broken, *without notice* to the mortgagor, is valid. The mortgagee entered into the dwellinghouse part of the mortgaged premises before witnesses, and placed the plt. in it, a tenant at will, but gave no previous notice to the mortgagor, who was informed of the entry by the tenant; but the mortgagor being so informed, entered and turned the plt. and his family, &c. out; he brought trespass. Held, the mortgagee's entry was lawful. Plt. recovered $500 damages. New trial refused; court divided as to excessive damages. The plt., his family and furniture were forced out of the house with violence and indignity.

When the mortgagee takes possession, he is not obliged to have his deed with him, nor to declare he enters for condition broken. It is sufficient if it appears his entry is for the non-performance of the condition: 2. An authority from the mortgagor to deliver possession, need not be in writing: 3. Where the mortgagee went to the land mortgaged, but not upon it, for the purpose of taking possession for condition broken, and soon after actually entered upon the land, and continued for three years to take the profits, the mortgagor having notice that he was in possession for non-performance of the cendition, and assenting thereto: Held, the right in equity to redeem, was foreclosed.

4 Pick. 468–470, Skinner & al. v. Brewer.

§ 13 *con.* Held, after the mortgagee had foreclosed, and the mortgaged premises were less than the debt, the mortgagee might sue on the note for the balance due to him. See Hatch *v.* White, 2 Galls. 152–161.

3 Mason 474, Amaly v. Swan.

Same principle, 5 Cowen 380–382, Globe Ins. Co. *v.* Lansing; and 2 Dickins 551–785; 8 Ves. 527; Dunkley *v.* Van Buren, 3 Johns. Ch. R. 331; 3 Mass. R. 562; 4 Pick. 19.

Writ of entry by mortgagee, to recover possession. Held, 1. The deft. cannot plead a tender after condition broken, but before action brought; nor that the mortgagee promised him he should hold the land discharged of the mortgagee. The mortgagor's right to redeem, is sold on an execution, he still has an interest, he can mortgage, and his right to redeem this second

5 Pick. 240–244, Maynard v. Hunt.

p. 289, Reed v. Bigelow.

mortgage, is assignable, and may be attached and sold on execution. p. 418, Fay *v.* Valentine. A mortgagee gets judgment, and enters *in pais* for condition broken, and then under the judgment. This last entry waives the first.

§ 21 *con.* But if the conveyance of goods be not fraudulent, the vendee's mere want of possession will not defeat his rights, so as to justify an officer in seizing them as the vendor's property, if previously notified of the conveyance. If the vendor, who sells or mortgages, has but a small part of the chattel, and the other owners who have actual possession, a symbolical or constructive delivery to the vendee or mortgagee is sufficient, even against creditors. The delivery was of A's third part of a carding machine to sureties, by going with one of them to it, and there delivering the bill of parcels and pointing to the machine. The delivery was by an agent. See 1 Pick. 389; Jewett *v.* Warren, s. 44.

3 Greenl. 425—429, Haskell & al. *v.* Greely.

§ 51 *con.* *Of a reversion.* Case in nature of waste committed by tenant in dower. Held, after the mortgagee of the *reversion* had entered after condition broken, but not before, he could maintain an action against the tenant for life for waste committed before the breach of the condition: 2. A tenant for life is answerable for waste committed by a trespasser; was cutting trees.

3 Pick. 203—205, Fay *v.* Brewer.

§ 52 *con.* Entry *sur disseisin* by the mortgagee to recover possession, the mortgagor set up *usury* and failed. The plt. had judgment; afterwards, the mortgagor conveyed to A the right to redeem. A brought a writ of entry against the mortgagee, meaning to prove *usury*. Held, he was estopped by the former judgment, of which the mortgagee could avail himself without pleading it. This estoppel runs with the land, and extends to all *privies* in estate to the judgment. Estoppels are not odious when a part of the title, and tend to prevent many law-suits.

17 Mass. R. 365—370, Adams *v.* Barnes.

Trespass; assignee of the mortgagee v. assignee of the mortgagor, for removing fixtures. These were erected by the mortgagor, after the execution of the mortgage. Held, trespass lay for the balance of the erection, which were a dwelling-house, with a cellar and chimney, and the mortgagor soon sold the estate to one, who occupied it about a year, and then sold the house and chimney to the deft. with authority to remove them. This he soon did; and for this cause the plt. sued, who took an assignment from the mortgagee while the mortgagor was in possession; against whom the plt. got judgment for possession of the land, *after* said removal, as to *fixtures*. See Elwes *v.* Maw or More, ch. 76, a. 8, s. 24. As to the action of trespass, see Starr *v.* Jackson, ch. 172, a. 3, s. 17.

2 Greenl. 273—275, Smith *v.* Goodwin.

§ 60. *This was a mortgage for the support of husband and wife.* The condition the mortgagor support them during their

lives. There was no covenant the mortgagor remain in possession till condition broken. The mortgagee in a writ of entry recovered possession. The mortgagor was not allowed to prove by *parol* evidence, it was agreed at the time of making the mortgage, he should remain in possession till he failed to perform the condition, and that he had not so failed. 16 Mass. R. 39–40, Colman *v.* Packard, s. 58. See art. 7, s. 18.

§ 61. In this case, in a writ of right, held, that lands mortgaged cannot be levied on for the mortgagee's debts, before he enters and takes possession. Issue was joined on the mere right 'the land mortgaged is only a pledge for the debt,' and, Mass. Act, 1788, c. 51, makes it assets in the hands of the executors and administrators, and distributable as *personal* estate.

16 Mass. R. 345—348, Blanchard *v.* Colbourn & wife.

§ 62. Where A has two tracts of land, and mortgages one tract by one deed, and the other by another, and both separate equities are attached and sold on one execution for *one gross sum*, not distinguishing how much each sells for, the sale is irregular but only *voidable*. The debtor has a right to redeem one tract and not the other.

3 Pick. 202—254, Fitch, Jr. *v.* Stone.

§ 4. The plt. sued by his guardians: entry surdisseisin for sundry parcels of land. Held, 1. The *cestui que trust* of a mortgage cannot maintain an action for possession of the land mortgaged against the tenant, who mortgaged the parcel here in question to one Nehemiah Somes, and the tenant's right to redeem not foreclosed. Hence his title was good against all men except N. Somes and his assigns, and the demandant was not such assignee. The mortgage was taken by N. Somes as guardian of the demandant, and for his benefit, in whom never vested the legal estate.

ART. 6. *Con.*

16 Mass. R. 348 to 360, John Somes *v.* Skinner.

2. If one sue to recover several parcels of land, by leave of court, he may discontinue or enter a *nolle prosequi*, as to one or more of the parcels.

3. The demandant in a real action, in which the tenant claims to hold under him, by force of his conveyance, may show it was obtained by fraud and imposition. To that end the demandant may show he was of a feeble understanding, so that he might be defrauded by artifices, which would not have prevailed against common men;—that the tenant had acquired an extraordinary influence over him. To prove such influence, transactions before and after, as well as at the time of conveyance may be admitted in evidence. The jury found the fraud and imposition.

§ 5. The entry of the mortgagee to foreclosure, must be with actual notice to the mortgagor, or open and continued possession. It is not sufficient, though made in the presence of witnesses, and though a memorandum of the entry be recorded in the registry of deeds. The object intended by law, is, that the

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mortgagor may know when the three years commence. The memorandum is not required by law, to be recorded. 17 Mass. R. 429–431, Taylor & al. *v.* Smith.

3 Pick. 484–492, Eaton *v.* Whiting.

§ 6. *Mortgagee when he may sell, &c.* A conveyance of land on condition to B, and if not paid to him by the debtor in a time stated, then B shall have power to sell it, and apply the monies to his debt, and pay over the surplus to the debtor, is a *mortgage*, until the power shall be executed. See an important case of a mortgage, ch. 130, a. 4, s. 70; as to attaching the mortgagee's interest see ch. 136, a. 16, s, 16.

2 Rand. 98–108.

§ 7. *How assignee may foreclose.* He may do it without making the assignor a party, if the legal title has been conveyed to him. Neither the mortgagor nor his assignee can hold *adverse* possession to the mortgagee, unless the assignee has taken a conveyance without notice; otherwise they are mere tenants at will. Mortgagor's seisin to assign, 19 Johns. 486.

1 Hop. Ch. R. 284–288, Bridgen *v.* Cashartt and wife.

§ 8. *Mortgages how distinct.* A holds two mortgages against B, of two distinct lots of land: A brings his bill to foreclose and sell. On one sale there is a surplus: this cannot be applied to make good the deficiency of the other: 2. The English doctrin of *tacking* mortgages does not apply in New York: 3. Each mortgage is surety only for the sum named in it. It is conceived this is the principle in every State in which mortgages are by law registered. See a. 1. s. 3, 7 Johns. Ch. R.

ART. 7. *Con.*

1 Hop. Ch. R. 48–59.

§ 11. A bill to foreclose a mortgage made by W. E.; Cross bill of C. C., charged W. E. as her guardian *ad litem*, during her minority. Sued in the supreme court for partition of these lands, whereof she was heiress, and judgment for a sale, and W. E. himself purchased. C. C. impeached the judgment in partition, as void for irregularity, and charged all the proceedings of W. E. to be fraudulent, and that the other defts. claiming under him had notice. Held, 1. Want of notice in a purchaser is matter of defence; this she must aver by way of defence, and establish by proof: 2. He must deny all knowledge of facts charged, from which notice may be inferred: 3. The denial must be full, positive, and precise: 4. If he rely on the want of notice in another, he must still aver the fact by plea or otherwise: 5. A cross bill is matter of defence: 6. It cannot introduce new and distinct matter not embraced in the original bill: if it do so, no decree can be founded on those matters, or original bill dismissed in favor of C. C.

1 Rand. 306–312.

§ 13. A conveys real estate to B *in trust*, to pay his own debt, this is a *mortgage*, and not *a deed in trust*. But if B sell, and A comes into equity for relief, the court will not decree in his favor, unless he makes the purchaser a party. See 2 Munf. 527, 3 Munf. 66–68; 1 Hen. & M. 29, Gelmer's R. 130: it was said, a trustee, in a trustee deed to sell, is viewed as the

agent of both parties. The difference is material: a trustee can sell *absolutely*, a mortgagee only *subject to the equity of redemption* as to real estate. 9 Wheat. 489.

No set-off against a mortgage: As on a bill to foreclose and sell, Troup the plt., was chief agent for the sale and management of the Pultney estate. 1 Hop. Ch. R. 239–272. Troup *v.* Haight, &c.

1 Hop. Ch. R. 460–470, The associates of the Jersey Company's, original complainants *v.* the York and Jersey Steamboat Ferry Company, and Barretto, Jr., deft. Nov. 1823, the last commisioners mortgaged to the first commissioners, the complainants, two ferry *boats* and *lands* in Jersey; and February 1824, said mortgagors mortgaged said *boats* to Barretto, Jr, he knowing the said first mortgage had been made when he took his. Held, the complainants, the first mortgagees, must exhaust their land fund, though in another State, and the title to it questioned before they could resort to their boat fund.

Quere. The first mortgagees acquired a prior title to both funds: this he knew. How then could their title be impaired, or their remedy be varied to their disadvantage by a subsequent mortgage?

§ 18. An administrator appointed only in another State, cannot assign a mortgage in this State. 1 Pick. 81, Cutter *v.* Davenport.

And 1 Pick. R. 87–90, Wilder *v.* Houghton: nor can the Mortgagee recover of the mortgagor the value of the rents and profits accruing after the commencement of an action by the mortgagee, to obtain possession. Decided in an action of trespass, *quare clausam fregit* for the value of the *mesne profits* brought by the mortgagee against the assignee of the mortgagor. The mortgagor, or his assignee, is not a trespasser till the mortgagee enters. The mortgagor has the rents and profits to his own use, till lawfully dispossessed. See Wilder *v.* Whittemore, a. 58.

1 Pick. R. 351 357, Atkins & al. *v.* Sawyer.

§ 19. A mortgagee cannot sell the equity of redemption to pay the debt secured by the mortgage. On the sale of such equity, on execution, notice to the administrator of the mortgagor alone is sufficient: decided on a bill in equity, filed by the heirs of the mortgagor to redeem. See Crane *v.* March, ch. 112, a. 2.

§ 20. *As to pawns and mortgages of vessels, &c., and possession remaining in the mortgagor, &c.* This was trover for the brig Frances, by an executor of a deputy sheriff; property the testator attached, against a stranger, who converted it. Held, 1. The action lay: 2. Whether a mortgage of chattels, to secure the mortgagee against his liability for future advances by him, be fraudulent or not, depends on the circumstances. A ship at sea, bound to a port in Massachusetts, was mortgaged in another

State, and it was stipulated in the deed, that the *mortgagor should remain in possession* till he should fail to pay certain notes. The vessel arrived in her port, &c., and was attached in an action against the mortgagor, *and another part owner.* After this, *and in a reasonable time after the mortgagee was entitled by his deed to take possession,* his agent gave notice of his claim at the customhouse, by a memorandum on the certificate of enrolment, the vessel then being in the hands of the attaching officer. Held, the mortgagee had a good title. Here the time of the mortgagee's taking possession, or in this case notifying his claim, was governed wholly by the terms of the mortgage deed: 3. The mortgagee replevied the vessel, and his agent received her from the attaching officer. Held, he had a right to the possession on account of the part belonging *to the other owner,* so he could maintain trover against the said agents: 4. *A chattel pawned* or mortgaged, is not attachable in an action against the pawner or mortgagor: 5. If no agreement, the pawnee or mortgagee shall sell the chattel, he is not compellable to do it: 6. Nor is he liable to the trustee process.

17 Mass. R. 399—400. Badlam, ex'r. v. Tucker & al.

1 Pick. R. 485—497, Bigelow v. Wilson.

§ 21. Ejectment: facts agreed: Jan 22, 1816, one Wyman mortgaged the demanded premises to J. and L. Pond. Dec. 20, 1819, Wyman's right to redeem was attached by one Prescott. Aug. 21, 1820, Wyman made a second mortgage to J. L. Pond. Sep. 2, 1820, his right to redeem this second mortgage was attached in several actions against him. Nov. 6, 1820, his right to redeem was sold in Prescott's action to the tenant. May 21, 1821, right to redeem on the second mortgage was sold to the demandant. Nov. 21, 1821, he tendered to J. and L. Pond, the sum secured by the second mortgage, and requested them to assign the mortgage. They refused the tender and assignment. Afterwards, the same day, the demandant tendered to the tenant the sum, with interest, he paid for the right to redeem the first mortgage: he refused to accept it. Nov. 6, the Ponds assigned the second mortgage to the demandant, who that day, afterwards, made another tender to the tenant, like the one before made to him, and requested his release of the right to redeem the first mortgage: the demandant claiming the right to tender as assignee of the second mortgage. This tender, the tenant also refused. Aug. 15, 1822, the demandant tendered to the tenant, and offered such sums, with interest, as he paid the mortgagee on the first mortgage, deducting the excess of rents and profits received by him, above the repairs, &c., made by him. The court held, the plt., as assignee of the second mortgage, had a right to redeem: 2. That the tender was seasonably made, being in one year next after the officer's deed to the purchaser excluded the day on which it was executed; and the court allowed the plt. to file his

bill in equity, and did not think it necessary to consider the attachment. Thus, if A mortgage to B, and C attach A's right to redeem, *and pending the suit*, A mortgages to D, then E buys that right, D, or his assignee may redeem. Filing the bill was by agreement of the parties: their agreement was in writing. (Probably, no case like this was ever before in a court of law.) The attachment was only a *lien*, and the debtor could convey or mortgage subject to it. This lien, the purchaser, or second mortgagee might discharge, by paying the debt 'before execution executed.' The sale of the right to redeem does not relate back to the time of the attachment. The statute reserved a right to the debtor to redeem, and a possibility coupled with an interest, is assignable. The debtor's right to redeem was positive not contingent, secured by the statute. When A mortgages his lands to B, A has left only *a right to redeem*, and this right he may mortgage to C, and C, second mortgagee, may pay B, and redeem; this is daily practice. The second mortgagee may assign clearly in equity.

3 D. & E. 88. Hob. 132.

§ 22. If a mortgage be fraudulent or void as to creditors, the original debt remains good: 2. Of personal property is valid, though possession of it be not taken by the mortgagee,—otherwise as to a pawn. If the mortgagor grants to A, and to him the mortgagee assigns all his interest, A cannot sue the mortgagor, on the notes secured by the mortgage. A mortgage on an estate insolvent, is security for the balance of the debt, after the mortgagee has received his dividend, with the other creditors, out of the other property of the deceased: 2. When a debt against an insolvent estate is secured by a mortgage of land, the commissioners must allow the whole debt, and not deduct the value of the land, and allow only the residue of the claim or debt; Moses *v.* Rantel, adm'x.; see ch. 39, a. 9, s. 7, contra, p. 525; a mortgage is good though a new note be given.

2 N. H. Rep. 13. p. 300. p. 488.

§ 23. Chancery will not keep an incumbrance alive, or view it as extinct, as may best serve the purposes of justice, and the intentions of the parties.

Starr *v.* Ellis, 6 Johns. Ch. R. 393.

CHAPTER CXIII.

BARGAIN AND SALE. PARTITION BY DEED.

A money consideration is essential in bargain and sale. Ejectment for a lot of land in the city of New York. Held, 1. A *pecuniary* consideration is essential to give effect to a conveyance of lands as *bargain and sale:* 2. A conveyance expressed to be in consideration of the future performance of certain conditions, though one of them be to pay money, is not valid as a

Jackson *v.* John and Mary Delancey, 5 Cowen, 427—432.

bargain and sale: 3. A bargain and sale of a *freehold*, to vest *in futuro*, is void, though otherwise *it seems* of a covenant to stand seised: 4. Where a deed states a consideration, and does not say for other consideration, none other than the one expressed, can be shown: 5. A deed cannot operate as a covenant to stand seised, unless the consideration of blood or marriage be expressed on its face. The plts. claimed as heirs at law, to the grantor, and judgment for them. The defts. did not contend it was a covenant to stand seised, as there was no blood in the grantee but that of a *son in law*. They urged 'it was a *bargain and sale* supported by a pecuniary consideration.' Not necessary for the deed to say that money was paid; that it is to be paid is enough. Cited Dyer, 336, b., and 337, a. As to the estate, commences *in futuro*, the defs. cited 1 Johns. Cas. 91, Saunders on uses, &c., 133, Bac. on Uses, 63, to prove a resulting use to the grantor. It does not appear the parties, or either of them attempted to prove any consideration not expressed in the deed; hence, what the court, or Savage, C. J., who delivered its opinion said on this point, was foreign to the purpose, therefore not applicable the very questionable part of the opinions of the court, or rather chief justice. There are scores of authorities to show a consideration *dehors* the deed may be proved when consistent with it, or rather not inconsistent. He cited only 7 Johns. R. 342: as to paying money *in futuro*, cited Jackson *v.* Florence, 16 Johns. R. 47: 7 Johns. 343, is on the idea any other consideration than that expressed in the deed, 'would be *contrary* to the deed.' Cited 1 Johns. R. 139, there, the objection was to showing a *greater*, or *different* one, and referred to Preston *v.* Merceau, 2 W. Bl. 1249. I have cited both of these cases as law, because, where the consideration *dehors* the deed, is *contrary* to it, or *greater*, or *different*, it is *not consistent with* the deed. But so is not Mildmay's case and many others, for a consideration *dehors* was proved. See 7 Johns. R. 342, examined in the original edition of this work, ch. 86, a. 9, s. 37; and 1 Randolph's R. 102–107; 2 Stra. 934, 935, and cases there cited; 4 Co. 1, Vernon's case.

CHAPTER CXIV.

CONVEYANCES TO USES AND IN TRUST.

ART. 3. *Con.*

§ 3 *con.* As the statute of uses was enacted *after* the statute of wills in England, it was long a question if the latter could have reference to the former, but now it seems to be settled, that a testator has power to raise uses by the joint operation of both, or by force of the statute of wills alone; and

the court will construe a devise one or the other way, as may best effectuate the testator's intentions. Sugden on Powers, 138, &c.

27 H. 8, ch. 16. This act does not extend to covenants to stand seised, and only to estates of freehold or inheritance. Sugden on Powers, 9, and statute book.

Art. 4. Con.

§ 3 *con.* See the doctrine of *scintilla juris* examined. Sugden on Powers, 1 to 45, where it appears there is much confusion in the books in regard to the spark of right left in the trustees or feoffees to uses, by the statute of uses, to support *contingent* uses, and give them effect as they arise. See a. 8, s. 8, 11, &c., a. 9, &c.

Art. 10. Con.

§ 7 *con.* A *bargain and sale* for a *pecuniary* consideration, of a fee simple estate to commence *in futuro*, will operate as a covenant to stand seised to the use of the party within the consideration, according to the intention of the party, without any formal words for that purpose. On such covenant no use can be raised in favor of a *stranger*, or one not of the covenantor's blood, even though the covenantee is a mere *trustee* for the blood relations of the covenantor. For when the covenantee is a *mere stranger*, there is no consideration of *blood* or *marriage* between him and the grantor.

Jackson v. Swart, 20 Johns. R. 85.

16 Johns. R. 515, in error.

To give a deed the effect of a covenant, to stand seised to uses, there must be the consideration of blood or marriage. There is neither in the relation of a *daughter in law;* and she is a competent witness for the grandson of the mother, of the deed in ejectment named to take the principal interest, for she has no interest, and though the grandson is a *blood relation*, he does not take the estate, and it seems to make the deed operate as a covenant to stand seised, the consideration of blood or marriage must extend to the whole estate, and if not to all then to no part. But was not the daughter in law a grantee upon trust, for the grandson, so no consideration of blood between the grantor and the grantee, as to any part of the estate. Savage, C. J. thought the daughter in law interested, so not a witness; but he agreed the instrument could not operate as a bargain and sale, for the want of a *pecuinary* consideration; nor as a covenant to stand seised, as there was no relation of blood between the grantor and Mary Saunders, the daughter in law; nor by way of assignment for want of livery of seisin; the estate attempted to be conveyed being a freehold.

1 Cowen, 622-645, Jackson v. Cadwell.

§ 13. Though a charity is not barred by the statute of limitations, yet an adverse enjoyment for a long time is a material consideration in construing an instrument under which it is claimed: 2. The master of a free school being appointed by

2 Jacob & W. 321.

p. 358

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persons acting as trustees, and having acted as such many years, if he has done his duty, his appointment is not to be questioned: 3. The master of a free grammar school may take boarders to be educated in it, if no prejudice to the free scholars: 4. There were made several donations, partly for the support of *a school*, and partly for the support of *a grammar school*. These were devoted by the commissioners of charitable uses in 1623, to the maintenance of *a grammar school*, and that decree having been followed to 1820. Held, the whole revenue must be applied to the uses of *the grammar school* at least, during the continuance of a master appointed under the existing system: 5. If a donation be made to trustees to support a schoolmaster, it is in their discretion to found a *grammar school*, or a school for teaching other branches of learning, subject to the control of the court of chancery: 6. On an application for the regulation of a free grammar school, the practice at the period of the appointment of the present master, is to be considered during his continuance in office.

p. 370.

p. 374.

§ 14. A sum of money bequeathed to a town for the purpose of building a town house, for transacting public business, is valid as a *charitable* legacy. 7 Johns. Ch. R. 292.

ART. 13. *Con.*

§ 3 *con. Trust and not a use.* The demandants counted on the seisin of one Joseph Brown, late pastor of the parish, in right of the parish, taking the profits, &c. within 20 years next preceding January 1, 1816, time of commencing the suit, the dismission of Brown from his office as pastor, and the entry, &c. of the tenants since the vacancy occasioned by his dismission; plea *nul disseisin*. Held, 1. The demandants must prove seisin as alleged: 2. If a devise be of real estate to one for the benefit of others, and the devisee has a discretion as to the persons or objects which are to receive the benefit of the devise, such devise is a *trust and not a use:* 3. A devise or grant to one for the benefit of another, not executed by the statute of uses, vests the seisin and entire legal estate in the trustee: 4. The English statutes, as to uses and trusts, have ever been in force in New Hampshire: 5. Said the judiciary in this State 'cannot enforce a *specific* execution of a trust;' 'the only remedy which the *cestui que trust* has against the trustee, is therefore by an action of *assumpsit*, founded on the implied promise of the trustee, that he will execute the trust evidenced by his acceptance of the trust.' This devise was of an estate in the hands of trustees for the use of a *minister and other pious uses according to their discretion*. Hence not exclusively to the ministry, or parish, or both. The defts. were trustees in possession, and had been above 20 years, and managed the estate, and the ministers

1 N. H. Rep. 232–242, The New Parish in Exeter v. Odiorne & al.

occupied under, and received profits from them, and from other trustees, from the time of the devise in the year 1746; and the demandants had had no seisin by right or by disseisin.

§ 14. *Absolute estate where a trust, &c.* Probate cause. Decree in the probate court, directed Joy to render an account as executor of the will of Joseph Barrell, Esq. father of the complainants, on certain principles prescribed by the judge, both parties disliking some of them, appealed to the Supreme Court, which Held, 1. Though the conveyance of real estate be *absolute* and unqualified, any declaration in *writing*, made by the grantee or assignee, at any time after the conveyance, is competent proof that the property was to be holden *in trust* according to the terms of the declaration, within a fair and liberal construction of the statute of frauds. Letters or other papers, however informal, are sufficient to constitute such declaration, which, though not made to the grantor, is available to him or his representatives. In this case the complainants published a pamphlet, and Joy, in another, answered it, and in his answer were found the declarations in the case, and had they been published '*pending a suit*, they might have been punished as a contempt of court.' A agreed to hold rents after paying his own debt in trust for B, B recovered in *assumpsit* for money had and received.

16 Mass. R. 221–229, Barrell &c. v. Joy.

4 Pick. 71–74.

§ 15. Gray, the father, April 1805, bequeathed to the guardian, Winslow, $30,000 *in trust*, for the sole use of the wife, and directed the trustee to invest the same in real estate or public stocks, or both, 'as to the trustee should seem most fit, convenient, and secure, and promise the greatest benefit and advantage to the said Mary, for whose use the trust was created; and to pay to her all the income thereof during her widowhood and life, and the principal sum to the said 'minor at her decease.' This was a suit in equity, the bill charged the trustee with negligence in not investing, &c. He had lost most of the fund, and being unable to replace it, was removed, and ordered to convey his remaining estates to a new trustee, appointed by the court. Ordered, 1. The same estates being much less than the $30,000, the new trustee pay to the widow for the rears of the annuity then due, the amount of interest cast on the net proceeds of the estates received of the former trustee; and such interest being so deducted, the remainder was to form the future capital, of which the interest was to be paid to the widow as the whole she was entitled to receive: 2. The expense of putting into tenantable repair an estate purchased by such trustee, is a charge on the principal fund; that keeping it in repair, is to be deducted from the income.

16 Mass. R. 361–369, Parsons & wife v. Gray, a minor by his guardian.

Pauper expenses paid out of trust fund. See Poor, ch. 53, a. 4, s. 16.

Vol. IV. Ch. 114. Art. 13. Con.

§ 17. 4 Rand. 199–207. Where a grantor conveys the whole estate, *real and personal*, to trustees, the conveyance includes *equitable* as well as *real* rights, and the trustees are the proper persons to assert them in a court of equity.

1 Jacob & W. 124—135, Heathcote v. Hulme.

§ 18. *Trust property in trade.* Held, where trust property is employed in trade without authority, the *cestui que trust* must elect to take either the profits for the whole period, or interest for the whole period; but circumstances may arise to entitle them to take profits for one and interest for another part of the period.

Art. 14. Con.

1 Rand. 466—467.

§ 10. A debtor makes several notes to his creditors, and gives a deed of *trust* to secure payment of them. The first note is duly paid. The creditor assigns the second note to a third person, but not the deed; and assigns the third note to another person, with said deed. Held, the assignee of the second note is entitled to be first paid out of the trust fund. See a. 16, s. 6.

1 Hop. Ch. R. 10—11.

If an absent debtor's estate attached, proves sufficient to pay his debts and leave a surplus of real estate unsold, the *trustees* are decreed to convey it to him. Orr's case.

1 Hop. Ch. R. 283.

§ 11. *Trustee where not liable for a loss.* A, in trust for B, holds notes against a manufacturing company, and invests them in the stock of another manufacturing company; all done in good faith, and deemed, at the time, advantageous. A's estate is not liable though the notes be lost.

§ 12. *Academies*, trustees of them empowered by statute, to appoint and remove teachers, &c. at pleasure, cannot make any contract to abridge the right of removal in themselves or their successors: 2. The court of chancery has no power of *visitation:* 3. Can take cognizance of the case only on some ground of proper jurisdiction as to contracts, &c. 1 Hop. Ch. R. 278–282, Auburn Academy *v.* Strong.

5 Serg. & R. 401.

§ 13. *Pennsylvania. Trustees of an insolvent.* By deed he assigned in trust to A and B, his property, 'to pay the debts due, by the assignor to the following persons, respectively, viz:' and then followed the names of several persons, and the debts due to each of them, and among others, a debt to A, '*about* $11,000, when in fact it amounted to upwards of $13,000.' Held, A was entitled to a dividend on the latter sum. Brown *v.* Weir.

A verdict for a large sum was obtained against A, Saturday afternoon, that evening, he conveyed all his property to a trustee *of his own choice*, for the benefit of all his creditors, in equal proportions. The trustee lived at the distance of 23 miles, and did not hear of the deed until four days afterwards, when he assented. The debtor continued in possession of the

furniture and goods the next day after the execution of the deed and part of *Monday*, when they were levied on at a creditor's suit. The title deeds remained of the real estate in the grantor's hands near two months. Held, the deed was valid and took effect from the execution. It will be observed the officer seised the goods on execution when they remained in the debtor's possession, when he had done nothing to part with them but make a deed he retained, and when neither trustee or creditor had assented. The decision must have been on the ground the delivery of the deed to the trustee and his consent and the consent of creditors, related to the execution of the deed; may be further observed, the debtor appointed his trustee, but had the debtor reserved any benefit to himself, the deed had been void. 6 Binn. 338. Such debtor may prefer some creditors, 4 Dall. 85; independent of bankrupt laws. 1 Browne, 11. One may be *trustee* for the benefit of creditors, who himself is not a creditor. 1 Binn. 126; 2 Binn. 174.

Wilt v. Franklin, 1 Binn, 502—531.

§ 6 *con.* Many other cases cited to the same purpose specially pages 218–219, &c. If A hold money or effects *in trust* to pay known debts or legacies, he is bound to apply accordingly, the property so in his hands in equity, and cannot apply the same to pay debts due to himself. 8 Wheaton's R. 421 to 463, Wormly *v.* Wormly, and numerous cases therein cited. The reason is plain, he that gives or devises, or even conveys property to another *in trust* for certain objects, has a right to direct its application; from this the trustee has no power to deviate. Though the purchaser is not bound to see to the application of the purchase money as to pay debts *generally*, &c. yet he is liable in equity if he assist in the misapplication of it.

Art. 16. Con.

3 Mason, 178–231.

pp. 220-221, &c.

pp. 225—226, &c.

How the purchaser must see the purchase money re-invested or not, &c. Where on trusts that require time and discretion, he is not; but is, wherever affected with notice of the facts, which, in law, constitute the breach of trust, and the sale is void as to him. A *bona fide* purchaser, without notice, to be entitled to protection, must be so not only at the time of the contract or conveyance, but till the purchase money is actually paid. In this case the bill charged a breach of trust, and that the purchasers had notice of the facts that constituted the breach of trust in the trustee, and therefore they themselves were considered trustees in equity, held accountable for the rents and profits, &c.

8 Wheat. 421–484, Wormley, &c. *v.* Wormley, &c.

§ 10 *con.* Sugden on Powers, pp. 1 to 45, Ed. 1828, calls in question Coke's Report of Chadleigh's case and treats the *scintilla juris*, as a fiction, as also did Fearne, so Cruise, and see ante. 'The best way is to construe conveyances to uses as such at common law.'

§ 14. *Ejectment by trustee.* Holding the legal title, he can

4 Rand.

Vol. IV. Ch. 114. *Art.* 16. *Con.*

maintain ejectment even after the trust is satisfied, though a *cestui que trust* after the trust is satisfied, may maintain ejectment, that does not deprive the trustee holding the legal title, of his right to maintain ejectment. 6 Munf. 38.

§ 15. Where a trust is of a *public* nature, a majority of the persons empowered may exercise the authority; thus a majority of the managers of the election is a *quorum* for the trial of contested elections; and a majority of that *quorum* may decide.

State v. Delisseline, 1 McCord, 60.

Art. 17. *Con.*

§ 7 *con.* Was a bill in equity in Virginia, and the doctrine confirmed that a trustee cannot purchase or acquire by exchange, the trust property; his opinion must always be fairly and honestly exercised in selling it, and the sale will be void where he appears to have been influenced by private and selfish interests; and the sale is for an inadequate price, so he must appear fair and honest, &c. where he has power to sell and reinvest the trust property in other estate advantageously in his opinion. It is extremely clear that every trustee in managing the property of others in any manner, must avoid all private views in the least degree disadvantageous to the *cestui que trusts*.

8 Wheat. 421-464, Wormley and many others v. Wormley and many others.

§ 9 *con.* *Resulting trust to the heir.* As where A devised all the residue of his estate and effects whatsoever and wheresoever, of what nature or kind soever, to trustees upon trust applicable only to personal property. Held, the real estate passed with a resulting trust to the heir.

Dunnage v. White, 1 Jacob & W. 583—585.

§ 23. On the whole it seems to be settled in Massachusetts that *parol* evidence cannot be admitted. See 15 Mass. R. 210–220, Goodwin *v.* Hubbard, &c. Otherwise in New York; 3 John. 216–223, Foote *v.* Colvin. In England the point is left in uncertainty. Many authorities both ways.

Art. 22. *Con.*

§ 6 *con.* *Estates open in like manner in Pennsylvania*, as 1 Serg. & R. 374. A seized in fee in consideration of natural affection and £600, executed a deed of land to B, and C his wife, the daughter of the grantee, and to the *children* and heirs of C, and the heirs and assigns of such *children*. *Habendum* to said B, and C his wife, and the children and heirs of the said C, to the use of said B and C for their joint lives and the life of the survivor, and immediately after the death of the survivor, to the use of the children and heirs of the body of said C, lawfully begotten, their heirs and assigns forever, in equal shares, as tenants in common, and not as joint tenants. When the deed was executed, C had three children living, and several children and grandchildren were born afterwards. Held, B and C took an estate for their joint lives and the life of the survivor of them, with a remainder *in fee* to the children of C, whether born or to be born, which fee *vested* in the three children born when the deed was made, and *opened* to let in after born children, at the periods of their respective births, and that the shares of those that died leaving issue, descended to their issue.

Wager v. Wager.

§ 5 *con.* Writ of entry. Lemuel Drake died, seized of the demanded premises and other real estate in 1806. Nov. that year his will was proved, and in it he devised thus—'I give to the town of Stoughton my lot of land in said town which I bought of Ephraim Wales, (the land sued for,) containing about eight acres of woodland in said town, which I have bargained for, of Elijah Belcher, and in failure of recovering a deed of said Belcher for said land, I give to said town three hundred dollars. Both of the above pieces of land, (or money instead of the last piece,) I give to said town for the purpose of building a schoolhouse for the use of the free grammar school, (or other school as the said town may direct,) provided the said schoolhouse be built by said town, within one hundred rods of the place where the meetinghouse now stands.' Held, 1. This was a devise on condition *subsequent*, that the estate vested accordingly in the devisees: 2. That it was forfeited by a neglect of twenty years to comply with the condition: 3. It passed to the *residuary devisee*, and not to the heir, there being an interest in the testator, not specifically devised, depending on the performance or nonperformance of the condition. The residuary clause contained all the remainder of his estate of whatever name or nature, and wherever situated to his wife in fee. The court added—'the inhabitants became seized in fee simple conditional; and the contingent interest not otherwise disposed of, was disposed of by the residuary clause.' In Barker *v.* Wood, there was no such *contingent* interest for the residuary clause to act upon; so the heirs took the estate devised to the school districts, which could not take.

Vol. IV. Ch. 114. *Art.* 25. *Con.*

5 Pick. 528—540, Hayden & al. *v.* town of Stoughton.

§ 7 *con.* Held, in chancery, where land is not converted *out and out*, at all events into personal estate, but its conversion depends on a condition, it is not viewed as personal estate in equity: 2. When a sale is made, then the surplus proceeds, (after paying debts,) is viewed as personal property of him who is entitled to redeem, and goes to his executor, &c.: 3. A conveyance by a husband passes all his wife's interest, if he survive her; if not, only an interest during his life: 4. *Part* performance, as where A contracts for land, and can get a good title, but to a *substantial part* he may insist on this part, or may be compelled to accept it, with a reasonable compensation for the residue, which cannot be effectually conveyed to him by the other party. The sale was to be made on the request of A or B, and B or his heirs had power to prevent a sale.

Art. 27. *Con.*

2 Rand 120—131, Evans & wife *v.* Kingsberry and wife.

§ 13. A having the equitable, but not the legal title to land covenants to convey it with general warranty. Held, if he cause the holder of the legal title to convey to the covenanter, and thereupon executes a deed himself with general warranty, he complies with his covenant to convey.

Barret *v.* Morrison, 2 Litt. 69.

Vol. IV. Ch. 114. Art. 27. Con.

§ 14. On a contract *to convey* lands for a certain sum when required, no demand at the residence of the person bound is necessary. On a covenant to convey land, if action be brought it is in the discretion of the jury to allow interest or not. 2 Tenn. Rep. 5, when no time is specified in a bond to make title, the obligor is bound to make it in a reasonable time: 2. In an action on it, the value of the land at the time of the contract is the measure of damages: 3. In case of such bond the bounds of the land not being defined *parol* evidence is admissible, to ascertain them, deduction in equity for a deficiency in the quantity.

Elliot v. Fowler, 1 Litt. 200. Id. 258.

1 McCord, 122.

2 Litt. 73.

One who purchases a tract of land of A, knowing A had covenanted with B to let him have a way through it, will be decreed in equity to convey the right of way.

Art. 28. Con.

§ 6 *con.* James, appt. *v.* Morey, impleaded with Johnson, respts. 2 Cowen, 246—323. Appeal from the court of chancery to the court of errors. Among two or three scores of points stated by the reporter, are as to merger: 1. At law, where a greater estate and a less meet in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or in the law phrase it is said to be *merged*: 2. This rule, at law is inflexible: 3. Where legal and equitable estates unite in the same person, the equitable is merged in the legal estate, but in equity the rule is not inflexible: 4. But it depends on the intention of the person, expressed or implied, in whom the estates unite, whether the equitable estate shall merge, or still be kept in existence; 5. Or on the circumstance he is not capable of making the election, being a minor, &c.: 6. In the latter case the equitable estate is kept on foot. So when for his interest so to do: 7. Thus the common case, where the mortgagee takes a release of, or purchases the estate of the mortgagor, that is his equity of redemption, the whole estate is vested in the mortgagee, and the mortgage is extinct, and with it the mortgage debt, unless intention, incapacity to elect, or interest, &c. in the mortgagee intervenes and prevents the merger: 8. Where the mortgagee purchases, or takes a release of the equity of redemption in a part of the mortgaged premises, the mortgage is extinguished *pro tanto*, and may be apportioned between such part and the part not so. Numerous other points as to mortgages. See mortgages—this case, 6 Johns. Ch. R. 41.

§ 12. Contended if A mortgage land to B, and C purchases A's right to redeem, and then pays B his debt, and takes his assignment of the mortgaged premises, this, though an *assignment* in form, is *an extinguishment* of the mortgage, as these premises *merge* in the equity of redemption. But see ch. 112, a. 2, s. 1. See this doctrine of merger, or sink-

3 Pick. 475—484.—Ch. 130, a. 4, s. 72.

ing of the *mortgage* charge or incumbrance into the *legal* estate very critically examined, 3 Greenl. 260–269, and ch. 112, s. 2, s. 27. The case is—A and B, tenants in common, May 18, 1814, mortgaged the lands to C and D, to secure the joint debt of A and B, sum $400, due in six months, with interest. July 16, 1816, their right to redeem was sold to E, at a sheriff's sale, by Paul, the deft., a deputy sheriff, to pay two executions he had against A and B, in favor of another creditor. October term, 1816, C and D get judgment on their mortgage for possession. February 22, 1817, C sold and conveyed all his interest in the land to E. July, 1817, E conveyed to the plt., Freeman, *one half* of all the right in equity that belonged to A and B, the mortgagors, and which E had before bought of Paul, at the sheriff's sale, the condition in the deed not having been performed. A *pluries habere facias* having issued on the judgment recovered by the mortgagees, for possession, it was delivered to a coroner for service, July 13, 1818, by the plt., Freeman, attorney, to the mortgagees. October 24, 1818, as by the coroner's return, he delivered possession. The plt., F., received the costs and wrote the return; May 22, 1819, E. conveyed to Paul, the deft., in fee, all his right, title, and interest in the land; 'thus uniting in Paul the titles of mortgagor and mortgagee of half the premises.' This the plt. viewed as paying half the debt to Paul, by his having a complete title to half of the land, and hence, October 5, 1821, tendered to him the other half. This being refused, the plt. filed his bill to redeem. Judgment for him. The court, on numerous authorities, held, 1. The mortgage on the united moiety should be viewed as subsisting, and *not merged*, if Paul so intended, and his intention appearing, actually or presumed: 2. If no such intention appeared, the court would consider what was most for Paul's interest: 3. 'If it appear wholly indifferent, the charge or incumbrance will be treated as *merged*,' of course half of the land thus having become the absolute property of the creditor, is viewed as having paid half his debt. It appears by this case the mortgagee may, if he so intends, acquire the mortgagor's title, yet preserve his mortgage separate and subsisting, and especially to prevent a mortgage holding, made *after* his, but *before* buying the right to redeem; for if the first mortgage merge, it is extinct and no longer precedes the second, *after* one, which is the purchase of the right to redeem. This is a novel and rare case in the books, and leads to consequences by no means yet well examined. Freeman v. Paul.

'*Mergers* were never favored in courts of law, and still less in courts of equity. Never allowed but for special reasons, 11 Co. L. 338 b.

Vol. IV. Ch. 114. and then only to preserve the intentions of the parties. 1 P. Wms. 41; 15 Vin. A. 362.

Art. 30. *Con.* § 17. If tenant for life bargain and sell, by deed acknowledged and recorded, to C, and he makes a deed back to tenant for life, with special warranty against all claiming under C, and then he mortgages to tenant for life, she remaining all the time in possession, there is no discontinuance.

1 Pick. R. 312-328.

1 Barn. & Cres. 238-244, Doe v. Jones. § 18. *Discontinuance can be made only by tenant in tail in possession;* therefore, when by marriage settlement, *certain* premises were conveyed to trustees, and their heirs, and assigns to the use of the father and mother of the intended husband, for their lives and the life of the survivor, remainder to the use of the intended husband and wife, and their assignees, for their joint lives and the life of the survivor, remainder to the use of the heirs of the husband by his intended wife. Held, that under this deed the husband took an estate for life, and an estate tail in remainder, hence he could not, when in possession of his life estate, discontinue the estate tail, by granting a lease for lives with livery of seisin, not being in possession of his estate in tail. His life estate did not *merge* in his estate tail, as another estate intervened. See Merger, art. 28. Cited by the court, Stra. 1125; Dougl. 337; 5 B. & A. 910; Cro. El. 827; 1 H. Bl. 269; 1 Salk. 344; 1 Co. 93; 3 Har. & Mc H. 443; 1 Mason, 208–228.

Art. 31. *Con.* § 29 *con.* By the common law, if the lessee for life, on condition to have a fee, made a lease for life, that prevented the estate rising under the condition, because the privity on the estate was destroyed. This is not the true construction on the statute of uses. Edwards *v.* Slater, Hard. 410; Savile *v.* Blocket, 1 P. W. 777; 10 East, 443, Doe *v.* Thorby; see this case, ch. 130, a. 2, s. 28.

CHAPTER CXV.

COVENANT OF SEISIN OF RIGHT, &c.

Art. 1. *Con.* § 18. See ch. 62, a. 1, s. 13, implied warranty, &c. An action on warranty of property must be special, if the contract has not been rescinded. Id. If rescinded *assumpsit* lies for the price. 2 Con. R. 75. Implied warranty extends to property exchanged. 1 Mc Cord, 110. Express warranty of title, under seal, does not exclude an implied warranty of soundness. 1 Mc Cord, 421.

Art. 2. *Con.* § 8 *con.* 1 Mc Cord, 122. The rule of *caveat emptor* does not apply to sales by the master, and he being the agent

of the parties, for whose benefit the sale is made, they are as much bound by his representation as they would have been by their own. Tunno *v.* Fludd. 1 Litt. 46. This maxim, *caveat emptor*, is not to be applied against a purchaser, where there has been fraud or misrepresentation on the vendor's part. VOL. IV CH. 115. *Art.* 2. *Con.*

§ 29. Pleadings by heirs as to *assets*. *Assumpsit* against four heirs. *Capias ad respondendum* served on all. Held, 1. In an action against heirs, if they will show nothing by descent, or *assets* insufficient by descent, they must plead or give notice of this specially, and cannot show it on the general issue: 2. The rules of pleading are in this respect, the same, in the case of heirs, as of personal representatives: 3. If they do not so plead, the plt. may take judgment, either generally, or of assets descended, at his election: 4. Execution against infant heirs cannot issue till a year after judgment: 5. But when some of the heirs are adults it may issue against them short of a year: 6. If against both short of a year, it may be so amended as to affect only the adults. ART. 3. *Con.* Van Deuzen *v.* Brower and others, 6 Cowen, 50–52.

§ 3 *con.* A conveyed in fee land to D, with general warranty, and E then was seised of six acres, a part of it by an elder and better title. D entered under his deed and become seised only of the part of which A was seised, but as to E, the stranger, D's entry was a mere trespass: 2. E sues D in trespass and recovers damages and large costs, D can only recover of A the proportion of the consideration money and interest, the damages and costs being recoverable only when incurred in defending the seisin D actually gained by conveyance from A, E being seised and actually possessed, by such title, of said six acres, no part thereof passed to D. Then as to these six acres, A's 'covenant of seisin and right to convey was instantly broken,' and D's right of action accrued. His entry on the six acres gave him no right of possession, and at his own peril he contended with E. It seems D ought to have noticed E's visible and rightful possession of the six acres, and not entered thereon; but had A been seised and possessed *in fact*, when he gave his deed of the six acres, then A's seisin and possession had passed to D, and his entry thereon would have been proper, and then when sued by E D would have defended the seisin A conveyed, and incurred costs, &c. at A's expense, and failing to defend, A would have become liable to D for the loss of the six acres and for the damages and costs D would have incurred. ART. 7. *Con.* Cushman *v.* Blanchard & als 2 Greenl. 266–269.

§ 1 *con.* A conveys to B a certain tract of land, not specifying any quantity, A is not held to warrant any particular number of acres, if there be in the case no false representations, and no concealment of facts in his knowledge, though ART. 8. *Con.* 2 Rand, 51–67, Tucker *v.* Locke, &c.

Vol. IV. Ch. 115. Art. 8. Con.

both parties may have expected more acres than were found on an after survey, and their expectation was founded on documents and other evidence known to both.

2 Rand, 122-174, Stout v. Jackson.

In this much examined case it was decided that where a freehold estate has been conveyed with warranty, and the warrantee is evicted the *proper measure of damages is the value of the land at the time of the warranty.* A *quære* is made, if an action of covenant will lie on a *mere real warranty:* 2. In such case the purchaser can only recover rents and profits of the vendor, and not the value of any *improvements* he has put on the land: 3. The best standard of value is, in general, the price agreed on at the time of the sale, December, 1823. The action was covenant on warranty in Virginia, but the land was in the State of Ohio. The breaches of covenant were *incumbrances, want of power to convey, and failure to warrant*, so a mixed case; hence the rule laid down may be correct as the case in fact was. So was the special verdict deemed a new case. In this case other cases are cited in which different opinions had been expressed. Some make the value at the time of the contract, and some of the eviction, the rule of damages. The special verdict found both values—$800 at the time of the warranty, and $2937,50 at the time of eviction. Judge Coalter for the latter; Judges Green and Brooke for the former. On the whole, this case leaves the point unsettled.

2 Litt. 262.

The action of covenant on a warranty by a *remote* grantee is *local*, and must be sued in the county in which the land lies: 2. And if not so, advantage may be taken on general demurrer: 3. But if once the cause has been carried to the court of appeals, and that point has not been decided, want of jurisdiction can never be alleged afterwards, though the cause was remanded, a new declaration was filed, and a demurrer filed on the ground of want of jurisdiction.

1 Mc Cord, 121.

§ 8. A tract of land is sold by the master in equity, and represented on the map, as containing more acres than found on a survey: for the deficiency an abatement in the price was allowed; and p. 125, in note, the conveyance was of a 'tract of land containing a mill seat, with a dam, and timber ready for building; which mill seat, dam, pond, timber, and all other appurtenances to said premises, I do warrant, &c.' Held, that a third person having title to the land which one half of the water in the mill pond covered, but not to any part of the land mentioned in the deed of conveyance, there was a breach of warranty; as the mill was of no use, unless the whole pond was full of water. Action on a note, plea *non assumpsit*, the deft. may prove it was given for a tract of land,

p. 470.

the lines and boundaries of which were fraudulently misrepresented by the vendor. Purchaser must be supposed to know as well as the seller what right and title an individual can have to a navigable river. 1 Mc Cord, 580, 584.

§ 9. *Declaring on a covenant of warranty.* The plt. must allege substantially an eviction by title paramount, but need not in any formal words: 2. Where it was averred 'that the said O had not a good and sufficient title to the said tract of land, and by reason thereof the said plts. were ousted and dispossessed of the said premises by due course of law.' Held sufficient, as a substantial averment of an eviction by title paramount: 3. The plts. declared both as heirs and devisees, without showing particularly how heirs, and without stating the will. Held, not fatal, on general demurrer: 4. Such a defect may be amended under the 32d section of the judiciary act of 1789, ch. 20. There was several counts in the declaration, and a demurrer to it. Causes: 1. 'It does not appear in and by the said declaration any averment or allegation therein, that the said plts. have been evicted by title paramount to the title of the deft.; and 2. The said declaration is in other respects defective, uncertain, and informal.' Was error from the circuit court of Tennessee. 10 Wheat. 449—454, Day & al. v. Chism.

§ 10. *Warranty not binding;* as Locke *v.* Alexander, 2 Hawks, 155, where A and B, having interest in lands in common with C and D, executed a deed of *bargain and sale* for the land *in their own names*, professing in the deed to act as well for themselves as for C and D, their cotenants, but acknowledging the payment of the purchase money, transferring the title, but warranting it, '*as attornies aforesaid.*' Held, in an action of covenant on the warranty, that the title of C and D did not pass, because the deed was not signed in their names: 2. That the interest of A and B, who made the deed, did not show any consideration paid them *in their own right:* 3. That the warranty could not be considered as a personal or independent covenant: 4. But as no estate passed *the warranty was not binding.*

§ 4. The wife's *enchoate* right of dower, living her husband, is an existing incumbrance. 2 Greenl. 22–28. ART. 9. Con.

§ 11. Covenant of warranty runs with the land. It is intended for the benefit of the assignee of covenantee and his heirs, and an action lies accordingly: as where A grants to B, with warranty, and B to C, with warranty, C is evicted by a title paramount to A's: C may have covenant directly against A, or against B, and B have covenant against A. In this case C sued A and recovered. This case needs no authorities to support it. Withy v. Mumford, 5. Cowen, 137—143.

§ 12. Where land is warranted in deed, in fee, covenant lies

Vol. IV. Ch. 115. *Art.* 9. *Con.*

against the executors of the warrantor, and the grantee is not confined to his voucher or *warrantia chartæ:* 2. Plt. need only state on his covenant, and aver generally, that the grantee was evicted of part, or all of the granted premises, by lawful right and title of a stranger, especially on general demurrer: 3. If two tenants in common be evicted, their damages are personal, and the survivor may sue on the covenant of warranty. Court cited Kent *v.* Welch, 7 Johns. 258; 5 Cowen, 137, above; 2 Bl. Com. 301, &c.; Gore *v.* Brazier; Marston *v.* Hobbs, &c.

Townsend *v.* Morris, &c., exr's., 6 Cowen, 123–128.

17 Mass. R. 213—221, Chapel *v.* Bull.

§ 14. *Incumbrances: covenant broken: land in Ohio.* By a law in that State, if it appear on a petition of tenants in common of lands, for partition, that the land cannot be divided without prejudice to the whole property, a writ issues to the sheriff to sell the whole at auction, and to divide the proceeds among the tenants in common. Pending such a petition, one of the tenants in common conveyed his purparty, covenanting against *incumbrances.* Afterwards, the whole land was sold by the sheriff, under an order of court pursuant so said law. Held, the grantor was liable for breach of covenant, and the price paid by the grantee, with interest from the time of conveyance, was taken as the measure of damages.

17 Mass. R. 586—591.

§ 15. Covenant broken: *incumbrances.* The deft. previously mortgaged the land, and then conveyed it with the usual covenants. After the grantee entered, the mortgagee demanded payment of the deft. due on the mortgage, and threatened to sue for possession, &c. The grantee purchased the rights of the mortgagee, paying the amount, and received a release; held, to be a sufficient breach of the covenant to entitle the grantee to his action.

§ 16. A conveys to B with warranty, &c., and B to C, &c., C is evicted. B cannot recover against A, until B compensates C; Lott *v.* Parish, 1 Litt, 396, and 109; a judgment recovered against B, on the testimony of a witness interested against A, is inadmissible as evidence against him.

Cummins *v.* Kennedy, 3 Litt. 126.

§ 17. Where the consideration of land was another tract of land, the value of the land conveyed, and not of that given in consideration, is the measure of damages in an action of covenant on the warranty.

Art. 10. *Con.*

§ 5 *con.* The Monte Allegre. In judicial sales there is no warranty express or implied. On a marshal's sale, under a *license* or *order* of court, no warranty is implied. Neither he, or his agent, the auctioner, has any authority to warrant the article sold. Where an executor assigns a judgment, rendered in favor of his testator, and covenants as *executor* that so much is due on it, his covenant is personal, and binds him in *his own right*, and the covenant is broken as soon as made, if nothing, or not so much, be due on the judgment.

9 Wheat. 616–649.

2 Cowen, 781–810, Marvin *v.* Stone.

§ 7 *con.* When an administrator has license to sell lands only to pay debts, he need not give a new bond, under statute 1788, ch. 32: Maine act 1821, ch. 60, s. 29; the court admit the usage has been otherwise. 3 Greenl. 282–289. VOL. IV. CH. 115. *Art.* 10. *Con.*

§ 14 *con.* Court license to sell real estates. Formedon in remainder: plea, general issue. Decided, 1. A license granted to an administrator to sell land to pay a debt barred by the statute of limitations, respecting executors and administrators, is void: 2. Devise to A for life, remainder to the demandant in fee. Tenants entered under a title invalid by purchase, and held above six years, making improvements, &c. A died, and the demandant sued this writ. Decided, the tenants were entitled to the benefit of the *betterment act*. See Thompson *v.* Brown, 16 Mass. R. 180. 5 Pick 140—145, Heath *v.* Wells, & al.

CHAPTER CXVI.

QUIET ENJOYMENT, &c.

§ 1. Same as to an incumbrance: the plt. must state how incumbered. A mere denial does not necessarily show a breach. There may be disturbances and incumbrances which are not covered by covenants for quiet enjoyment, and against incumbrances. 4 Pick. 87–89; Eden on injunction, p. 30. ART. 2. *Con.*

§ 6. A covenant of, in substance: as 2 Murph. 47, Jacocks *v.* Gilliam: a tenant in tail aliened, and in his conveyance, he, 'for himself, his heirs, executors, and administrators, doth covenant and agree the premises to him, the said grantee, his heirs and assigns, against the lawful claims and demands of any person, or persons, whatsoever, forever hereafter, to warrant, secure, and defend.' He then died, and real assets descended to the issue in tail, of greater value than the lands aliened. *Held*, here was no *discontinuance* of the estate tail, and that, in fact, this was a covenant for *quiet enjoyment*, the breach of which is to be repaired, not in *land*, but in *damages*; and these primarily to be paid out of the *personal* estate. See discontinuance, ch. 114, s. 30. ART. 3. *Con.*

§ 16. To support the plea of *bona fide* purchase, without notice, so as to entitle one to relief against a conveyance, said to be fraudulent, the party must aver and prove he had no notice of the rights of the other party, and that he *actually paid the purchase money before he had any notice* of it: not enough he has secured the purchase money. ART. 6. *Con.* Jewet *v.* Palmer, 7 Johns. Ch. R. 65.

§ 17. If A contract to sell land to B, and refuses to perform, and sells to C for a valuable consideration, C having notice of B's title, may be compelled to convey the land to him. See Farnsworth *v.* Child. Champion *v.* Brown, 6 Johns. Ch. R. 398.

Vol. IV. Ch. 117. *Art.* 5. *Con.*

CHAPTER CXVII.

REPAIRS AND RENT.

§ 7 *con.* 16 Mass. R. 238–241, is a case decided on the principles of the cases of Pollard *v.* Shaaffer, and Fowler *v.* Glover; tenant on lease to rebuild, &c.

CHAPTER CXVIII.

COVENANTS MUTUAL, &c.

Art. 2. *Con.*

§ 2 *con.* Where the acts stipulated to be done, are to be done at different times, the covenants are to be construed as independent of each other. 8 Wheat. 217–228.

So, 5 Cowen, 509–513, wherein articles for the sale of land, the vendee covenanted to pay one sixth of the purchase money in one year, and the residue, in five equal annual instalments, and the vendors covenanted, that on payment of the sums of money, and fulfilment of the agreement to be performed by the vendee, they would convey, &c. Held, these covenants were *independent*, and *mutual*. The court relied on West *v.* Emmons, 5 Johns. 179–182; Robb *v.* Mortgomery, 20 Johns. 15; but Parker *v.* Parmele, id. 130, not in point, but dependent or *concurrent*.

2 Greenl. 82–86, Reed, adm'r. *v.* Cummings & al.

§ 13. *Remedies, mutual and independnt:* as where A, seised of an equity of redemption in land, gave a bond to B, conditioned to convey to him part of the land in fee, with general warranty on B's paying certain notes, given by him, for the purchase money. A died insolvent; the original mortgage not satisfied. Held, A's administrator might recover the amount of the notes, and leave B to his remedy. The remedies, in this case, do not seem to have been strictly *mutual*; but the payment of the notes seems to have been a condition *precedent* to giving the deed, which was 'to be given *upon the payment of the money*,'—(notes:) See Lyman *v.* Estes, 1 Greenl. 182.

Smith *v.* Hoff, 1 Cowen, 127–130.

§ 14. If a master agree with his negro slave in writing, or parol, that if he pay £80, to be earned by working out, &c, he shall have his freedom, the payment of the *whole* sum of £80 is a condition precedent. See ch. 62, a. 4, s. 23: by the act 1 R. L. 612, the owner may manumit a slave by last will or testament, or by any certificate or writing for that purpose. See ch. 90, a. 11, s. 31.

Art. 3. *Con.*

§ 4. *Assumpsit* on a writing, in which King agreed to buy, and Dana to sell and transfer bank shares, at a certain price, to be paid on the transfer: the payment and transfer to be made

2 Pick. R. 155, Dana *v.* King.

at any time after one month, and within one year, at King's option and request, he giving Dana a week's notice to do the same. Held, these were dependent promises, and that the plt. could not recover the money, not having made an offer to transfer the stock, nor did King offer to pay or demand a transfer. Clearly King was to do the first act, that is, to make his election and request, and give notice as *to time*, within eleven months he had to make his option.

Vol. IV. Ch. 118. *Art.* 3. *Con.*

2 Pick. R. 292-304, Couch *v.* Ingersoll; same question as covenants, and many of the same cases cited as in Dana *v.* King.

§ 11. The plt. by an express simple contract with the town, agreed to board a pauper for a year, at the rate of a dollar a week, and save the town from any expense on the pauper's account, except physicians' bills. The pauper died at the end of the first week. Held, the stipulations were dependent, and that the plt. had not performed his part of the contract, so could not recover for the whole year; but as he was prevented performing by the act of God, and the express contract was thereby dissolved, he was intitled, on an implied promise, to compensation for part performance. Plt's. council attempted to put the case on the ground of Fowler *v.* Bolt; Paradina *v.* Jane, &c., ch. 117, a. 2: but the court put the case on the ground of Thorpe *v.* Thorpe, ch. 118, a. 5, s. 1; and Stark *v.* Parker, 2 Pick. 267, that is, the plt's. performance was a condition precedent.

4 Pick. 101—104, Willington *v.* Inhabitants of West Boylston.

§ 12. Covenant. The plt. covenanted to pay certain rent due, and in arrear, to one D. F., on a certain farm, and all which should become due on the 25th of March, 1825, the whole to be paid on that day, and the plt. covenanted, that on the deft's. so paying the rent, he, the plt., would give up, and discharge a certain bond and mortgage. Held, the paying the rent was a condition *precedent*.

6 Cowen, 398-399.

§ 9. Action of covenant. A agreed to tender bonds, with good security, on the 25th day of December, 1800, to B; and B agreed, the same day, to convey certain lands to A. Held, A's agreement and tender 'was a condition precedent,' to B's obligation to convey, 'the covenants being to be performed, on both sides, at the same time, were, therefore, dependent on each other, and neither party could insist on the other's performing his part of the covenants, unless he himself performed, or offered to perform his covenants at the appointed time.' The plt averred no such performance or offer. Hence his declaration was incurably bad. It was not quite correct for the judges to say A's offer, &c., was *a condition precedent*. Strictly these were *concurrent* covenants.

Art. 4. *Con.*

3 Rand. 68-71.

2 Greenl. 22—28.

Vol. IV. Ch. 118. *Art.* 6. *Con.*

Case in Virginia. The plt. covenanted to deliver a crop of wheat at his barn, to the defts. at $1 50, a bushel, (60 lbs. each,) between Jan. 13th and March 1st, 1813; and they covenanted to pay in six months. Held, 1. The plt. was not bound to have the *whole* ready at one time, but might deliver it in reasonable parcels, giving notice when a parcel was ready, &c.: 2. The defts. were bound to use reasonable industry in taking away such parcels: 3. In dependent covenants, when the plt. has performed a part for which he can have only covenant on the contract, and no other remedy; he may sue as if the covenants were independent.

3 Rand, 71-82, Lewis v. Weldon and others.

4. Held, the above covenants were dependent. Jan. 28, plt. delivered and defts. received four hundred and twenty-three bushels and a half, and before 1st of March, the plt. was ready to deliver five hundred bushels more, and gave notice, &c. on, &c. *and the defts. neglected to take it away, until after the 1st day of March*, whereby the plt. was hindered in getting out and having ready for delivery before that time, another quantity, (one thousand, five hundred and fiftyfive bushels;) and after March 1, and before June 29, 1813, the plt. delivered and the defts. received ——— bushels, (being the residue of the quantity promised.) Defts. paid no part, and demurred to the declaration, and stated five causes; all in fact in this, the plt. did not aver he delivered, or was ready to deliver, all the wheat, (two thousand, four hundred and eightyfour bushels and fifteen pounds,) before the first of March. It seems the plt. delivered and the defts. received all the wheat, though not in the time agreed on, and the defts. caused the delay by not taking away the five hundred bushels, when they were bound to take them, &c. On the whole this case differs some from all the others. This was a stronger case for the plt. than that for the plt. in Boon *v.* Eyre.

4 Rand, 346—351.

If the party fail to allege the performance of a condition precedent in a declaration, a verdict cures the defect: 2. The proofs conform to the allegations: 3. In a contract for the purchase of lands, and no time to convey, but a time is fixed for payment, the conveyance is not a condition *precedent* to the payment: 4. Generally a promise to pay money, and no day of payment named, the promisor is held to pay immediately: 5. If a *collateral* act, as to convey lands, he has during life to perform, unless hastened by request. Ch. 91, a. 2, s. 7; ch. 118, a. 3, s. 1; 4 Rand 352-355, same principles.

Reab *v.* Moor, 19 Johns. R. 337.

§ 9. *Condition precedent.* The plt. agreed to work for the deft. eight months for $104, or $13 per month. Held, the contract was entire, and that the plt. must perform the whole eight months as a condition precedent, before he could sue for his wages. Similar principle, 20 Johns. R. 15; 16 do. 267; 17 do. 293.

§ 10. When covenants are dependent, the payment of the purchase money and conveyance of the land must be *simultaneous*, and there must be a capacity to convey the land, existing at the time in the party to convey a good title. But, 2. Where the covenants are independent, and the payment of the money is to precede the conveyance, it is no excuse for the nonpayment, that the party has not a present existing capacity to convey a good title: 3. But if the party who is to pay, offer to pay on receiving a good title, the other party must make him a good title, or the contract will be rescinded. Robb v. Montgomery, 20 Johns. R. 15.

§ 11. The deft. covenanted to pay the plt. $2,500 by instalments, and in consideration thereof the plt. covenanted to convey in fee simple to the deft. certain lands. The parties agreed if the first instalment was paid at the time, and the deft. wished to have a deed, and would give a bond and mortgage of the premises conveyed to secure payment of the other instalment, the plt. would then give a deed with warranty, and take a mortgage. Before the first instalment became due, the plt. sold and conveyed the land in fee simple, and assigned to him the contract made with the deft. In an action to recover the instalments, the court held that the covenants were mutual and independent; that the deft. was bound to aver in his plea, a demand of a deed from the plt. and an offer to execute the bond and mortgage. Further, that the contract was not rescinded on the plt's. part; that he had not disabled himself to perform it as B might be compelled in a court of chancery to perform the contract. id. The decision in this case may well be doubted; for, clearly, it was no part of the original contract that the deft. should have the trouble and expense of a chancery suit with B, or receive a circuitous title through him.

§ 12. *Dependent covenants.* By deed the deft. covenanted to pay $250 for certain lands. Jan. 1, 1818, the plt. covenanted, on such payment, to give to the deft. his heirs and assigns, 'a good warranty deed of conveyance' of the land. Held, these covenants were *dependent;* that the words 'a good warranty deed of conveyance,' referred to the instrument of conveyance only, and not to the title. Hence, the plea the plt. was not seized or had not title, was not good, to avoid the action brought to recover the purchase money: But, 2. A plea the plt. did not, on the day appointed, or since, tender or offer to execute a good warranty deed of conveyance of the premises to the deft., is a good bar; for the vendor cannot maintain an action for the purchase money, without conveying or tendering to convey. id. Parker v. Parmele, 20 Johns. R. 130.

Similar principles—Harding *v.* Kretgenger, 17 Johns. R. 293; 12 do. 442; 13 do. 359; 16 do. 267; 17 do. 239–479.

CHAPTER CXIX.

COVENANT LIES IN SUNDRY CASES, IN OTHERS NOT.

§ 6. Land of A and B sold for taxes. A redeems; is to the benefit of both, for A had his action for contribution, and though he took the collector's lease to himself alone, B has his writ of entry against A to recover his, B's part. After the township was sold for $61 10, to pay $41 09 taxes, A and B, nonresidents, not knowing of the sale, made partition by deeds with warranty to each other. The redemption was in time, that is, within the two years. Gray, the deft. by his partition deed, with warranty to Williams, the plt. vested in him the title to redeem his part, and when Gray redeemed, if he acquired any right, it operated to secure Williams, as Gray could not claim the land against his own deed. He redeemed as the agent of Williams. Is there not another view of this case. Williams acquired a complete title to his part, subject to the sale for taxes; that sale was to be void if the tax was paid in two years; it was so paid, and the sale becomes void, and the *tax* title extinguished; and the release of the purchasers to Gray operated by way of *extinguishment* of the *tax* contingent title. If Gray meant to buy half a township for $69 11, and exclude Williams from the land and from redeeming, (for when Gray took the deed, Williams had nine months to redeem,) was it not a fraudulent act on Gray's part.

3 Greenl. 207-214, Williams v. Gray.

Action to recover taxes assessed on A. Johnson and his estate. Held, a tax cannot be legally assessed on a person after his decease, but the assessment must be on his estate in the hands of his heir, administrator, or whoever else may be in possession of it. The plt. was a collector of taxes, and his whole power to sue rested on stat. 1789, ch. 4.

5 Pick. 236—238, Cook v. Leland, admr.

Trespass for taking a chaise and converting it to the deft's. use; plea not guilty, and statement of facts in which the defts. justified as assessors of Seeconk. Held, not responsible to an inhabitant for any unintentional error committed by them in the assessment of a tax, but the party, thereby injured must seek his remedy against the town, &c. Stat. 1823, ch. 138, s. 5.

5 Pick. 451—453, Ingraham v. Daggett & al.

April, 1828. Trespass. Decided an assessor's warrant made and signed by the assessors, with one seal affixed, while they were together, *and concluding* with 'under our hands,' and without adding '*and seals*,' is valid.

5 Pick. 496—498, Bradford v. Randall.

Assessors. Trespass. 1. Persons assessed are legally taxed though some persons are assessed not liable to be assessed: 2. A second assessment to rectify the first is illegal: 3. A religious society votes a sum of money without appropriating it, meaning it should be assessed on a valuation of May 1, fol-

5 Pick. 496—503, Inglee v. Bosworth & al.

lowing, and to be applied to pay expenses, to be incurred after that day. Held, a person who separated himself from the society after the vote and before the first of May, was not liable to be assessed: 4. A person whose property was distrained to pay such illegal tax, might maintain trespass against the assessors on an action for money had and received against the society.

§ 3 *con. College.* 16 Mass. R. 202–208. The estates of Harvard College in the hands of their agents wherever situated within the State, are exempted from public taxes by the annual tax acts prior to 1829.

Harvard College. 1 Pick. R. 177–179, Soper *v.* Harvard College, held, the statute 1819, c. 37, respecting discipline in the colleges is constitutional, and in an action on it, the declaration must allege that rules have been established and an officer authorized, &c. pursuant to the statute.

§ 10. *Direct or land taxes assessed on acts of congress.* These have been assessed on a valuation actually made 'of lands and dwellinghouses and the enumeration of slaves.'

The first valuation was made under an act of congress passed July 9, 1798, and the valuation was made on oath. The then sixteen States were divided into ninetyfour divisions, and a commissioner appointed for each: met in each State: had a sworn clerk. Sect. 7. They divided each State into assessment districts; in each they appointed one respectable freeholder as principal assessor, and a proper number of respectable freeholders assistant assessors, all sworn. Sect. 8. Assessors valued houses and lands at 'their *worth in money;*' enumerated all slaves between twelve and fifty years of age. Sect. 9. Each owner required to deliver a list, &c. to the assessors, containing a minute written description of each separate piece of property. [Feb. 1799, repealed as to the description and number of windows.] Sect. 12. All the lists had relation to Oct. 1, 1798. Sect. 14. If the owner failed to give a list, or gave a false one, the assessors made one, and might legally enter, &c. Sect. 16. The assessors valued lands, houses, and slaves in three lists; owners' names placed alphabetically; houses, value $100, or under, were valued with the land. Sects. 18, 19. Each owner had an opportunity to examine the valuation of his property, and an appeal to the principal assessor, who decided summarily. Sect. 20. Appeals in writing, specifying the cause of appeal. Sect. 22. The commissioner empowered to equaliza by adding or deducting so much per cent. Sect. 23. Lists, &c. recorded by the principal assessors, and corrected as directed by the commissioners. Sect. 24. Surveyor of the revenue appointed and sworn in each as-

sessment district. Sect. 25. He to receive and preserve the records of the lists, valuations, and enumerations, and keep and note therein property transferred, if an entire piece, and charge its valuation to the purchaser; if divided, charge each party, &c. New houses, &c., &c. built, to be added and valued. Sect. 26. Surveyor to assess the tax, &c. subject to revision. Sects. 28, 29. Salaries, &c. In all these minutiæ, as to all the lands, houses, and slaves, in the United States, the assessment was effected without any serious difficulty.

Act of congress, July 14, 1798, assessed a tax of $2,000,000, on the above valuation.

N. Hampshire,	$77,705 36 2		Delaware,	$ 30,430 79 2	
Massachusetts,	260,435 31 2		Maryland,	152,599 95 4	
Rhode Island,	37,502 8 0		Virginia,	345,488 66 5	
Connecticut,	129,767 0 2		Kentucky,	37,643 99 7	
Vermont,	46,864 8 7		North Carolina,	193,697 96 5	
New York,	181,680 70 7		South Carolina,	112,997 73 9	
New Jersey,	98,387 25 3		Tennessee,	18,806 38 3	
Pennsylvania,	237,177 72 7		Georgia,	38,814 87 5	

The sums show the relative value of lands, dwellinghouses, and slaves, in the several States in 1798. Assessed on a house, out-houses, and land, valued from $100 to $500, two tenths of one per cent., so rising gradually to one per cent. on a house, &c. valued above $30,000; on each slave fifty cents. Residue on lands valued as above. Sects. 5 and 6 directed every one's tax to be made out by the surveyor for the collector, who gave bonds, &c. sect. 7. Sect. 8. The tax of each one remained a lien on the real estate and slaves two years after payable. Sect. 9 directed advertisement and personal notice to be given by the collector to each person taxed, &c. For taxes not paid in time, distress and sale of personal estate: his commission eight per cent. Tools of a trade or profession, beasts of the plough, arms, household utensils, and apparel necessary for the family, exempted. Sect. 13 directed when a tax on lands or houses remained unpaid one year, the collector should advertise the same two months, in six different public places in his district, and in two gazettes in the State, &c. to sell at public sale, under the inspector's direction, either the house, or so much of the tract of land 'as may be necessary to satisfy the taxes due thereon, together with costs and charges, not exceeding at the rate of one *per centum* for each and every month said tax shall have remained due and unpaid.' Right of redemption two years, on paying, or tendering, to the collector for the use of the purchaser, his

heirs, or assignees, 'the amount of the taxes, costs, and charges, with interest for the same at the rate of twelve per cent. *per annum*, and so doing, the sale to be void.' No deed to be given till the time of redemption expired. This 13th section is important, as many houses and tracts of land were sold under it, and not redeemed, and many titles, especially in the cases of poor persons, often have, and will, come in question in the courts of law. Sections 14 to 21 merely respected the accounts, &c., &c. of the collectors and other officers, involving no essential principles.

The principles adopted in 1798, in regard to direct taxes, have, in substance, been subsequently adopted.

There was no other federal direct tax till the year 1813: then one of $3,000,000, one in 1815, $6,000,000, one in 1816, $3,000,000, assessed on a new valuation. Act of congress of April 20, 1818. Sect. 3 directed, in case of sales, for these taxes, of the property of minors, &c. they have two years to redeem after their disabilities are removed, on paying to the collector of the district, &c. the amount paid by the purchaser, with ten per cent. a year thereon, and the amount of his improvements to him to be appraised by three or more neighbouring freeholders, to be appointed by the clerk of the district court and sworn, and to make return to him. The right to redeem lands, &c. sold on the act of August 2, 1813, to the United States extended to June 1, 1820, interest twenty per cent. on the tax, and twenty per cent. more, 'chargeable thereon,' and this right to redeem was extended to all, also, having an equitable or reversionary interest. Act of congress May 11, 1820, extended the time as to the taxes of 1815 and 1816, and as to lands, &c. purchased on behalf of the United States to June 1, 1821, paying the tax, twenty per cent. a year thereon, 'and additions of twenty per cent. chargeable thereon.' Right to redeem in equity, &c. as above. Sect. 2. If no officer to give a deed to a purchaser, he may petition the district judge, stating facts, and showing he is entitled to a deed, the judge is directed to order the marshal to make a deed to the purchaser, which deed acknowledged in open court, and recorded, has the same effect as if made by the collector, &c.

Act of congress, April 20, 1818, empowered the clerk of the district court to give a deed and extended to property sold both to individuals and property purchased in behalf of the United States.

Vol. IV. Ch. 120. *Art.* 3. *Con.*

CHAPTER CXX.

COVENANT. WHAT IS A BREACH OF COVENANT, &c.

§ 15. If there be one breach well assigned in a declaration in covenant, the declaration cannot be held ill on demurrer. Mc Coy *v.* Hill, 2 Litt. 374.

CHAPTER CXXI.

COVENANTS. PLEADINGS BY DEFENDANTS.

Art. 2. *Con.*

§ 22 *con.* A tenant is estopped to dispute the title under which he enters, or that stated in the lease under which he holds; nor can a party *at law*, set up an *equitable* title in opposition to a *legal* one. 1 Nott & Mc Cord, 369.

Art. 3. *Con.*

§ 20. Where a contract contains covenants, some of them conditions precedent, to be performed by the plt., and some not, *a plea* alleging generally, 'that the plt. did not perform the covenants which were to have been performed by him,' is bad.

1 Litt. 5.

2 Litt. 373.

A covenant is declared on a plea denying the delivery of the deed, is bad, if it do not state the facts so certainly and positively that no other conclusion can be drawn, than there was no legal delivery.

CHAPTER CXXII.

AN END PUT TO THE COVENANT, OR RESCINDING.

Art. 2. *Con.*

§ 2 *con.* Waiver of forfeiture by receiving rent, &c. Held, 1. To make a receipt for rent operate as a waiver of a forfeiture of the estate demised, the rent not only must be *received* after the forfeiture is incurred, but such rent so received must have *accrued* after that time: 2. And this validates the lease only to the time when the rent accrued so received: 3. But will not operate as a waiver of a forfeiture incurred by continuing the original cause of the forfeiture after the day on which the rent received fell due. See ch. 117, n. 4, s. 3; Doe *v.* Bliss, 4 Taunt. 735; Doe *v.* Banks, 4 B. & A. 401.

Jackson *v.* Allen, 3 Cowen, 220-231.

17 Mass. R. 606-663, Marston *v.* Baldwin.

§ 17. In case by *conditional* sale of goods, where the condition is not performed by the vendee, the vendor may establish his property in the goods, though he do not show the contract *is rescinded*, and though he do not return a partial payment made by the vendee, in whom the property was to vest

on his paying a certain sum, the actual delivery of the goods, in such cases, does not transfer the property. The contract must be fulfilled. Smith *v.* Field.

Whenever there is a part performance, under a special contract, and that is rescinded by the parties, the party so performing may recover on a *quantum meruit*. 4 Pick. 114—116, Hill *v.* Green.

§ 25. *Exchange of goods rescinded on account of fraud*; as if A be defrauded by B, A elects to rescind the contract; it is not sufficient for him to give notice to B to come and *receive* his goods, but A must himself return them to B, before any right of action accrues. 3 Greenl. 30—34, Norton *v.* Young.

§ 26. *Rescinding contracts in equity.* One party cannot rescind. 2 Johns. Ch. R. 526. Where one means to rescind because the other has broken the contract, he must act decidedly, and in season, on the first information of such breach. 17 Johns. R. 437. If he do not, but negotiate, or allows the other to proceed on the contract, he waives his right to rescind. Id. Cases on appeals, 19 Johns. R. 513; 13 do. 307; 17 do. 357, and numerous cases therein cited.

§ 27. Healy *v.* Utly, 1 Cowen, 345, 355, in error. Healy by special agreement purchased certain oars of Utly. They were delivered to S., the agent, who soon said to Utly he could not pay for them; that Utly must take them and do the best he could with them. Utly took them and delivered them to Herrick who sold them, and Utly gave a receipt and order to H., and therein called them his, Utly's, oars, and appropriated a part of the proceeds when the same should be sold. Held, the contract of sale was *rescinded*: 2. That the property of the oars revested in Utly: 3. That he could not be considered the agent of Healy to sell them: 4. Nor was H. liable to U. for the difference between the contract price and the sale price: 5. In an action for this difference in the common pleas, the pl. should have been nonsuited: 6. As that court refused to nonsuit him, it was error: 7. Whether the contract was rescinded or released, was a question of *law*, where the facts were clear and not disputed.

CHAPTER CXXIII.

COVENANT, PLEAS IN IT ON SEVERAL HEADS.

§ 21. Covenant against the defts. for not having delivered sufficient timber for the repairs of certain messuages, tenements, mills, and premises situated in ——. The covenant was to deliver timber (growing on the premises,) sufficient for the repairs thereof. Averment, that there was timber growing Snell *v.* Snell, 4 Barn. & Cres. 741-750.

Vol. IV. Ch. 123. *Art.* 3. *Con.* on the premises sufficient for the repairs, but the defts. had not delivered it. Plea, that there was not timber growing on the premises sufficient and proper for the repairs. Issue thereon. *Semble*, that the covenant meant that the timber should be sufficient in quality as well as quantity, and that the plea was good, not having been demurred to, without stating that there was not timber sufficient for any part of the repairs.

CHAPTER CXXIV.

COVENANT, VOUCHER.

Art. 3. *Con.* § 2 *con. Parol demurrer.* It is not found to be in use in the United States. However the principle may apply in some cases in some States.

Art. 4. *Con.* § 5. The writ of *warrantia chartæ* may in some cases be used in Maryland. 3 Har. & Mc H. 423.

CHAPTER CXXV.

ESTATES.

Art. 3. *Con.* § 5 *con.* Before the statute of *quia emptores*, the heir so had the estate, as, without his consent, his ancestor could not alien it, as was the case of the heir in tail after the statute *de donis* was enacted, and before fines and recoveries enabled the ancestor to alien the estate.

Art. 4. *Con.* § 2 *con.* The law as above, so casts the estate on the heirs, that for the debt of one, the creditor may attach the
17 Mass. R. 81. share immediately on the death of his ancestor, and within thirty days after judgment extend his execution on his share, and the title will be good against a coheir to whom the debtor's part had been regularly assigned by due proceedings in the probate court.

5 Pick. 185, 186, Foster *v.* Gorton. So the law gives the produce, &c. to the heirs, &c.; as where the widow of an intestate, before administration, leased lands and animals belonging to his estate. The lessees, creditors, attached the produce of the land and the increase of the animals. Held, trover lay against the attaching officer in favor of the heirs and administrator, respectively, for said produce and said increase. The lease was void.

Art. 5. *Con.* § 22. 3 Pick. 232–246, *First* Parish in Sutton *v.* Cole: so if the name of the devisee be mistaken, the devise is valid, if the devisee can be understood, as in this case, the devise was to the *south* parish in Sutton, where it was meant the *first* parish. A parish takes property by devise, &c., and holds it

for the support of schools. See also Massachusetts statute, 1789, c. 19, s. 8, to the same purpose.

§ 31. So land conveyed to A for life, remainder to B, in fee. B dies, leaving a sister of the whole blood, and afterwards a brother of the whole blood is born, the fee shifts from her to him on his birth. 3 Har. & Mc H. 403–407.

An estate by limitation. Error to the circuit court of Pennsylvania. Ejectment by Daly's lessee *v.* James. Special verdict found. August 8, 1768, John Bleakley devised all his real estate to his son J. B. jun. and his heirs lawfully begotten; *and in case of his death without issue*, he ordered Archibald Young, his executors, and administrators, to sell the real estate *within two years after the son's death*, and he bequeathed the proceeds thereof to *his brothers and sisters*, by name, *and their heirs forever, for such of them as shall be living at the death of the son, to be divided between them, in equal proportions, share and share alike.* All the brothers and sisters died, leaving issue. Then A. Young died, and afterwards J. B. jun., the son, died without issue. *Held, heirs is a word of limitation*, and none of the testator's brothers and sisters being alive at the death of J. B. jun., the son, the devise to them failed to take effect: 2. A sale made after the two years expired was void: 3. The powers to A. Young and his executors and administrators, to sell could be executed by the executors of the executors of A. Young. The court was not unanimous. Rather yielded to the decision of the State court on the same devise, and that decision was made by two judges against one. 8 Wheat. 495, 542, Daly's lessee *v.* James.

§ 44 *con.* A similar case, 9 Wheat. 325–353, Taylor & al. appellants *v.* Mason, respondent. The testator, Richard Barnes, owner of a great real estate in Maryland, made three wills: all proved. By his first will, dated in 1789, he gave his whole estate to his nephew John Thompson Mason, after certain pecuniary legacies to his other nephews and nieces. In the second will, dated in 1800, the testator gave his whole real estate to said John Thompson Mason, during his life; and after his death, to his eldest son Abraham in tail, on condition of his changing his name to Abraham Barnes, with remainder to the heirs of his nephew John Thompson Mason, lawfully begotten, forever, on their changing their names to Barnes. The third will made, as understood, in 1803, after some small bequests, proceeded thus. 'I give the whole of my property, after complying with that I have mentioned, to the male heirs of my nephew John Thompson Mason, *lawfully begotten, forever*, agreeably to the law of England, which was the law of our State before the revolution, that is, the oldest male heir to take

all, on the following terms: that *the name of the one that may have the right* at the age of twentyone, with his consent, be changed to A. Barnes, by an act of public authority of the State, without any name added, together with his taking an oath, before he has possession, before a magistrate of St Mary's county, and have it recorded in the office of the clerk of the county, that he will not make any change, during his life, in this my will, relative to my real property; and on his refusing to comply with the above mentioned terms, to the next male heir, on the above mentioned terms, and so on to all the male heirs of my nephew John Thompson Mason, as may be on the same terms; and all of them refusing to comply in a reasonable time after they arrive to the age of twentyone, say not exceeding *twelve* months, *if in that time it can be done*, so that no act of *intention* to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew John Thompson Mason, named A. T. Mason, on the above mentioned terms, and on his refusal, to his brother John Thompson Mason,' &c. So in like manner, to numerous relations. The testator appointed John Thompson Mason, his sole executor, with a salary of $1,600 per annum, for his life, and added, 'my will is, that he shall keep the whole of my property in his possession, during his life.' He then empowered his executor to manage his estate at his discretion, to appoint agents, to build houses, &c., to reside at the plantations, and to use the produce for his support, and added, 'after which, to be the property of the person that may have a right to it, as above mentioned.' 'Held, that the conditions annexed to the estate, devised to the oldest male heir of John Thompson Mason, were *subsequent*, and *not precedent*; so the contingency on which the devise was to take effect, was not too remote, the estate vesting on the death of John Thompson Mason, to be devested on the non performance of the conditions. *Quere*, whether John Thompson Mason took an estate tail? *Quere*, whether the last will revoked the two former ones? As the case was, it was not necessary to decide these two questions. The court thought it was clear the testator meant to preserve his real estate *entire*, in a single person, in succession, whether that person were of age, or a minor, and to prevent a *division* of it among his heirs at law. That this, his intention, might have been defeated by supposing he meant the conditions to be *precedent*, for if so, the remainder might have been too remote. As John Thompson Mason had no male heir lawfully begotten when the testator died, so the remainder was *contingent*, and might not have vested in the legal time, and hence failed, and such a failure must have totally defeated the testator's main and visible object;—the *perpetuating his real*

estate entire, by his will in a single person in succession. The court, too, considered the legislature might not change the names. This, too, if the condition was construed *precedent*, would defeat his main intention. The court held, he distinguished between *right* and *possession*, and meant the *right* to vest immediately, but the *possession* not till after the oath was taken. VOL. IV. CH. 125. *Art.* 5. *Con.*

§ 2. An inchoate right to land, held by entry and survey only, is real estate, and will descend to the heirs: 2. *Warrants and surveys* of land may be assigned by statute, but not *entries*. Morrison *v.* Campbell & al. *Art.* 6. *Con.* 2 Rand. 206—221.

Personal estate is limited in a deed to executors, administrators, and assigns of it. After the death of B and C, this limitation does not fail by the death of B and C, in the lifetime of A. Horseman *v.* Abbey, 1 Jacob & W. 381–387. 1 Jacob & W. 381.

CHAPTER CXXVI.

ESTATES, BY DESCENT ON MASSACHUSETTS STATUTES.

§ 2 *con.* 4 Pick. 21–24, held, various charges of sums of money made by a parent against a child in the usual way of keeping accounts, is no advancement, must be proved as in statute 1805, ch. 90, s. 3, March 12, 1806. ART. 1. *Con.*

It seems where a father buys lands, and takes the deed to a minor child, it is an advancement; but a trust to the father, where it expressly appears to be so intended, that is, a *resulting* trust. 11 Johns. R. 91.

5 Pick. 527, held, a deed of land made by the father to a son, partly in consideration of parental love and affection, and partly in consideration of $200, is not an *advancement* for so much as the land exceeded, in value, the $200. Held, also, statute March 12, 1806, ch. 90, repealed the act of 1783, ch. 36, as to *advancements*.

Massachusetts act, March 3, 1829, provides that every illegitimate child be heir at law to its mother, dying intestate, and so the mother to the child, dying intestate, without lawful heirs.

§ 6 *con.* Where an estate escheats *for want of heirs*, the freehold vests in the State from the time of the death of the person last seised, and before office found. It is conceived the same principle holds in Massachusetts, so far as her statutes have made no alterations. Harlock *v.* Jackson. 1 Cons. Rep. 135.

§ 7 *con.* It is believed this clause, 'the collateral kindred claiming,' &c., to the word remote included, is peculiar to this State, and first introduced into her laws, in forming this act: so

Vol. IV. Ch. 126. Art. 1. Con.

the paragraph that notices 'the inheritance that came from his father or mother,' &c., is new in Massachusetts law.

Escheats: but one claiming under an escheat title, must prove, 1. The former owner is dead: 2. Without heirs. 1 Har. & Mc. H. 339–346.

5 Cowen, 314–322, Jackson v. Ely & al.

Ejectment for four hundred and fifty acres of land in lot No. 77, Tully, (now Preble,) by the people, as land *escheated* to them for want of heirs. Held, 1. The jury must be satisfied beyond all reasonable doubt, that the tenant, &c., is dead, and that he died without heirs: 2. Hearsay evidence of finding the body and burial of one supposed to be dead, is inadmissible, though otherwise as to the fact of his death: 3. A grant of land to an *alien* soldier for military services, during the revolutionary war, and who died in that war, enables his heirs, *though aliens*, to inherit. *Oneida* Indian's *aliens*, yet the son of one of them could inherit under such a grant, which was to the father and *his heirs*: same as to a soldier *slave*.

Goodall v. Jackson, 20 Johns. R. 708.

Art. 2. Con.

§ 8. 16 Mass. R. 200–204, held, advancements of personal property are to be deducted from the distributive shares of the intestate's personal estate, belonging to the children advanced, when less then such shares: 2. If, on petition for partition, it appears the parties claim by descent from the same ancestor, and that advances have been made to some of the parties, not settled in the probate office, the supreme court is not, thereby, ousted of its jurisdiction in the case: the advancement in *personal* property is in the nature of a debt, due to the estate.

1 Pick. 157. 3 Pick. 450–452, Hall & ux. v. Davis & al.

Probate case, on appeal. A testator devised one fifth part of his estate, to each of his children, and directed all he had advanced to them respectively, and for which he had claims and demands, should be considered as parts of his estate, and as a part of the devises. These claims against the different children, were unequal in amount, and consisted of promissory notes on interest, and book charges. Held, 1. That the sum for which any note was given, should be considered as an advancement not bearing interest: 2. The promissor should not be allowed to pay it as a debt, in order to entitle him to a fifth part of the testator's real estate, because the sum for which the note was given by Hall, is not a *debt*, but an *advancement*.

Art. 3. Con.

§ 6 *con.* Divise of the testator's estate: 'one fourth part to be given to the families of G. Halloway, W. B. Blackburn, and A. Bartlett, to those of their children, that my wife shall think proper, but in a greater proportion to F. P. Halloway, than to any other of G. Halloway's children: to E. P. Bartlett in a greater proportion than to any of A. Bartlett's children; the balance to be given to the families of C. and J. T. Griffin's children, in equal proportions.' Held, that the children of C. and J. T. Griffin took *per sterpes*, and not *per capita*, and that the property

11 Wheat. 375 380, Walker & wife app'ts. v. the heirs of Griffin.

divised to them, was to be divided into two equal parts, one moiety to be assigned to each family. The circuit court divided *per capita*. Vol. IV. Ch. 126. *Art.* 3. *Con.*

CHAPTER CXXVII.

ESTATES, BY DEVISE.

§ 16. A codicil added. Ejectment for certain lands in Rhode Island. In May, 1806, the father made his will, and therein devised to all his surviving children in equal divisions, 'all his real estate,' and, subsequently by a *codicil* revoked the devise as to his daughter E., without any devise over of her share. As to this he died *intestate*: 2. A *codicil* confirming a will, is in law a republication of the will, so as to pass real estate, intermediately purchased: 3. A legacy bequeathed to a granddaughter by the *codicil* 'in lieu,' of a devise in the will to her mother, who had deceased, after making the will, is a revocation of the original devise to the mother: the real estate to the surviving children was to them as tenants in common. This first codicil was made in 1812, second in June 1818, the third in February 1820. Special verdict finding the material facts, and annexing thereto copies of said will, and of said three codicils, as parts of the jury's finding, &c. The testator purchased many real estates, between making his said will, and his third codicil, a fifth part of which were claimed by the demandants, as *intestate* estate. Held, as above, they were devised. See, also, many cases of republished wills, a. 312. Art. 1. *Con.* 3 Mason, 496-502, Brownell & ux. v. Wolfe.

§ 6. 20 Johns. R. 502, Prince v. Hazleton in error, held, a *nuncupative* will is not good, unless made when the testator is in *extremis*, or overtaken by sudden and violent sickness, and has no time to make a will. By the words 'last sickness,' within the purview of the statute, (Sess. 36, ch. 31, s. 14,) is to be understood *last extremity*. Art. 2. *Con.*

§ 8 *con.* The evidence proper to establish a *nuncupative* will; other words and acts of the testator may supply his omission to 'bid the persons present, or some of them to bear witness,' &c. 2 Greenl. 296-300.

§ 24 *con.* Appeal from a probate decree: 1. A will purporting a disposition of both real and personal estate, is void by the stat. 1783, ch. 24, s. 9, only where real estate cannot pass by reason of a defective alteration: 2. Where all the testator's property, real and personal, is given to one person, the will is not within the reason of the statute: 3. A minor 14 years of age, may make a will of his personal estate: 4. His will giving all his 'estate and property of every description whatsoever,' allowed as his will of his personal estate only. 1 Pick R. 239-244, Deane ex'r., app'ts. v. Littlefield & al.

VOL. IV. CH. 127. *Art.* 2. *Con.*

3 Pick. 375.

A man dies testate and solvent, and his widow waives her rights under his will, she cannot have a portion of his personal estate. As to minors making wills see a. 4, s. 1, and 2 N. Car. Law Rep. 599 : one under 18 years of age cannot make a w of his personal estate. See the colony law, which speaks of the age for making wills and testaments being 21. I have found no other case of a minor's making a will in the United States.

ART. 4. *Con.*

§ 4 *con.* Same distinction as to witnesses subscribing these and others. 5 Pick. 510–512, Needham *v.* Ide.

Jackson *v.* King & King, 4 Cowen, 207–221.

§ 14. Ejectment by the heirs of Moses Cadwell, said to be *non compos*, against the defts. claiming the land under his deed. So the question was, if he was of sane mind when he made the deed, for though the deed was *voluntary*, this was no objection to be made by *his heirs*. The introductory notes state numerous points as being law, most of which are only the opinions of the judge who delivered the opinion of the court. There was but one question in the case for the judges to decide, that was, what is *legal insanity*, that avoids a deed, and one for the jury to decide, that is, did the evidence prove the insanity the law required. Is it not better to have the introductory notes or marginal notes, contain only the legal points, made or moved, and decided by all or a major part of the court, in due form? It appears to me the best English and American reporters so confine themselves. Some judges are remarkable for giving long opinions, and on numerous points of law not in the causes, and not discussed; yet these same judges hold decisions not binding, made, when there is no discussion, and very properly. Held, in this cause on the proper points, 1. Where an act is sought to be avoided, on the ground of mental disability, the proof lies with him who alleges it: 2. Till the contrary appears, sanity is to be presumed: 3. But after a general derangement is shown, it is then incumbent on the party which insists the act was valid, to show sanity at the very time when it was performed: 4. What shall constitute that derangement or imbecility of mind which renders a party incapable of contracting? This is the legal question: 5. Idiots and lunatics, or persons *non compotes*, are of this description, and the disability is confined to these. Here is some confusion, *idiots* and *lunatics* or persons *non compotes*, that is, we may read, idiots and lunatics, are persons *non compotes*, or we may transpose the words, and read thus, persons *non compotes* are idiots and lunatics. So the question still occurs, what constitutes the imbecility or insanity of mind, or derangement that avoids a deed? And after all that is said in this and other cases about ancient confinement to *idiocy* and *lunacy*, and modern departure therefrom, this ever has been and is, in

practice, the question, that is, when has the insanity existed that has avoided the devise, will, deed, or other contract? We are naturally led thus to think, from observing that after all the refinement we see in this case of Cadwell, the court fell into the usual course of inquiry, and therefore thought him *compos* because he could do the business of his mill very well, &c. &c. though witnesses proved he forgot names, &c. Vol. IV. Ch. 127. *Art.* 4. *Con.*

§ 10. Where a testator has not been previously *insane*, the party alleging insanity must prove it; but if he has been once insane, then the party alleging his sanity must prove it. This appears to be the true rule, many cases cited. See insanity in the index. The same principle, 3 Har. & M'H. 513. Art. 6. *Con.* 3 Rand. 399—409, Burton v. Scott.

A testator, among other descendants, left seven grandchildren by a deceased son, and in his will mentioned two of them and their father by name. Held, the other five were not forgotten. *Quere* if a testator remembers one child in a numerous family, hence is it to be inferred he remembers all? Art. 9. *Con.* 2 N. H. Rep. 491—501, Merrill & wife v. Sanborn.

§ 1 *con.* To the same purpose, see 1 Cox, 77; Gilmer, 174; 1 Wash. R. 56; 2 Sch. & Lef. 240. As to the question when is an estate devised, or intestate, there are numerous authorties, as already appears. The simple principle on which they all are governed is this. If the estate or thing, be entirely devised so as that the devise of it leaves not any, even contingent interest in it undevised, and this devise of it fails to take effect entirely, then this estate or thing becomes intestate; but if the devise of it is such as leaves any interest, even a contingent interest, not included in the devise of it, this *undevised* residue, however small, falls, of course, into the *residuum*, and is included in the devise of *all the rest and residue of the testator's estate*, this residue including every kind of devisable interest the testator has not included in the prior parts of the will. Art. 10. *Con.*

§ 2 *con.* Where a devise of land is void in law, it goes to the heir, and not to the residuary devisee, unless it appears evidently meant for him. The devise was to the trustees of a college, and void in law. Chancellor dismissed the bill of the residuary devisees; affirmed in the court of appeals, many cases cited. Here chancery decided a *legal* question on a bill to compel an account of the profits of real estate. The cases decided in other States on general principles, confirm decisions in Massachusetts, made on the same general principles. The entire estate was devised to the college and failed. So within the principle above stated. 3 Har. & M'H. 333—338, Lingan v. Carroll.

§ 2. Testator purporting to dispose of all his estate, devised to his daughter, Lydia Bowers, 'the *improvement* of a farm on condition she pay to her sister E. H. £300 in three annual Art. 11. *Con.* 4 Pick. 198—210.

Vol. IV. Ch. 127. *Art.* 11. *Con.*

payments. The said premises to be equally divided between all her legal heirs, at her decease.' Held, by force of said act of March 1792, Lydia Bowers took an estate for life only, and that her children, living at the testator's death, took a vested remainder in fee. Bowers *v.* Porter.

CHAPTER CXXVIII.

ESTATES IN FEE.

Art. 1. *Con.*

§ 3. Devise thus—as to all my worldly estate, &c. I devise, &c., 'I give and bequeath to my daughter, a tract of land called E'—is a fee simple. 1 Har. & M'H. 452. But a devise to a son, and if he die before 21, or without issue of his body, then over is a fee tail, 463. A. D. 1775. A. D. 1772.

3 Rand. 289–286.

The words *temporal goods* may be borrowed from the preamble of a will, and coupled with a devising clause, to enlarge a life estate into a fee simple. If A die without heirs, then to B, his brother; A has a fee tail. All my *wordly goods* is the same as all my *worldly estate*. So temporal goods.

Art. 2. *Con.*

§ 3. Entry sur disseisin. Held, The devisee had a fee in this case. Where the testator devised lands to his wife for life,

3 Greenl. 239–242, Butler *v.* Little.

and then to one of his sons, without expressing the nature and duration of his estate, and bequeathed a legacy to another son 'as his proportion of the estate,' the first son had a fee. Cases to the same purpose, 8 D. & E. 1, Doe *v.* Holmes; 1 Com. R. 333; 2 B. & P. 247.

12 Wheat. 498–505, Potter appellant *v.* Gardner.

§ 7. A devise, 'I give and devise to my beloved son, Ezekiel W. Gardner, two third parts of that my *Ferry Farm*, so called, &c., to him the said E. W. G., and to him, his heirs, and assigns, forever, he my said son, E. W. G., paying all my just debts out of said estate. And I do hereby order, and it is my will, that my son E. W. G. shall pay all my just debts out of the estate herein given to him, as aforesaid.' Held, 1, This devise charges the estate with the payment of the testator's debts: 2. A *bona fide* purchaser paying the purchase money to one authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts: 3. But if the money be misapplied by the devisee or trustee, with the cooperation of the purchaser, he remains liable to the creditors for the sum so misapplied; was in chancery.

§ 13 *con.* The estate devised is charged and liable, when it appears the debts or legacies are to be paid out of it. Denn *v.* Miller, in the House of Lords. It is the same if lands be

devised to A, after paying his legacies, and his legacies being paid *thereout;* in both cases they are to be paid out of the land devised to A. See 2 Bos. & P. 247; 4 East. 496; See Doe *v.* Clark, ch. 125, s. 7, s. 9; Doe *v.* Snelling, s. 3, s. 26; Roe *v.* Doe, 3 M. and S. 518. So debts may be a charge both on the devisee and estate devised to him. 3 Mason, 178 to 231, Gardner & al. *v.* Gardner & al. The above and many other cases cited by the court, as 3 Burr. 1533–1618; 5 D. and E. 292, &c. Vol. IV. Ch. 128. *Art.* 2. *Con.*

A, devises a farm to his son B, (no words of inheritance.) The son furnishing his mother with firewood and grain of all sorts, for her comfortable support, and if she elected to leave the farm house, in the event of the son's marriage, then he to build a house for her. Held, this was a charge on the *person* of B; hence he had a fee. 19 Johns. R. 31.

§ 4 *con.* Was a writ of right. Held, 1. A devise of all the testator's 'estate, real, personal and mixed, goods, chattels, and estates, whatsoever and wheresoever they may be found, belonging unto me for any cause whatsoever;' gave a fee simple in the real estate of the testator: 2. When a will was proved by two of the witnesses and no notice to the heirs stated, it was presumed good reason existed for the absence of the third, and that notice was given to the heirs after the lapse of twenty years. Art. 3. *Con.* 17 Mass. R. 68–76, Brown & al. *v.* Wood & wife.

A devise was—'I will all my landed property in Northampton, to Abner Fogg, son of Jona. Fogg, he, as my executor, paying out all my willed legacies,' devised other lands, &c., and then added—'thus having disposed of my real and personal estate by this my last will and testament, I do hereunto set my hand.' Held, Abner Fogg had an estate in fee simple. In the introduction, the testator spoke of disposing of his whole estate; and the court said the word *property* in land meant the whole interest. 1 N. H. Rep. 163–167, Fogg *v.* Clark & al.

A devise directing that all the testator's children shall share equally in all his property, gives them the real estate in fee. 1 Jacob & W. 189.

§ 10. *The estate opens,* &c. Writ of entry. Facts stated. July 9, 1777, Joseph Whipple seized in fee, made his will, proved July 2, 1781. As to his worldly estate he disposed of it, &c., gave his wife certain personal estate, and the improvement for her life, of certain real estate, and to his granddaughter Hannah Whipple, £20, and added—'I give all the remainder of my estate, both real and personal, to my daughter, Sarah Annable, and the children born of her body, including all my wife has the improvement of during her life, after her decease.' Sarah had three children when the will was made; four when the testator died; two more were born after his decease. He died 1781. Held, 1. Sarah Annable and her four children, Art. 5. *Con.* 3 Pick. 360–364, Annable *v.* Patch & al.

Vol. IV. Ch. 128. *Art.* 5. *Con.*

living when the testator died, took an estate together in fee simple in the real estate, in the part in which the widow had a life estate, a vested remainder which *opened* to let in the two after born children: 2. In the rest a qualified fee, so limited as to admit their claims, by way of executory devise: 3. No right by survivorship having accrued before passing the act of 1785, ch. 62, s. 4, respecting joint tenancies. From passing that act the devisees held as tenants in common: 4. The court thought the after born children were entitled to share in the personal estate by way of executory devise. The court said the words 'children born of her body,' were words of purchase; cited Buffar *v.* Bradford, 2 Atk. 220, were the same words, and held words of purchase, though in that case the niece had no children when the will was made. Said act 'extends to past grants and devises in express terms;' 'no estate had vested in any survivor previous to the passing of the act;' 'the children of her body,' 'meant all the children she might have.' Part of the devised estate was a *remainder* on a life estate, so *prospective* the court observed. Cited also, Dingly *v.* Dingly, ch. 114, a. 21, s. 5. The only doubt is if the estate *vested* in the four children *opened* to let in children born afterwards. See Sawyer *v.* Rogers, &c. Seems to be different.

CHAPTER CXXIX.

ESTATES IN TAIL.

Art. 3. *Con.*

§ 5 *con.* Where A takes by devise an estate in fee defeasible on his dying without issue in the lifetime of B. Jackson *v.* Chew, 12 Wheat. 153–169, was a case on the will of Medeef Eden stated in the next case of Wilkes, &c. *v.* Lion; also in the case of Anderson *v.* Jackson. In this case, Jackson *v.* Chew, the Supreme Court of the United States adopted the local law of real property, as ascertained by the decisions of the State courts, whether those decisions are grounded on State statutes or State common law.

The principle in Fosdick *v.* Cornell, fully confirmed in the much considered and examined case of Wilkes and others, plts. in error *v.* Lion. Appeal from the Supreme Court to the court of errors, 2 Cowen, 333 to 400. The same had been previously decided on the same will in Anderson *v.* Jackson, 16 Johns. R. 332. The will was—'Medeef Eden seized in fee, having two sons, Joseph and Medeef, August 29, 1798, devised to Joseph, his heirs and assigns, certain real estate in the city of N. York, &c. included the premises, &c. and certain other real estate to Medeef, his heirs and assigns, and added, 'if either of

my said sons shall depart this life without lawful issue, his share or part shall go to the *survivor*, and in case of both their deaths without lawful issue, then I give all the property aforesaid to my brother, John Eden, of, &c. and my sister, Hannah Johnson, of, &c., and their heirs.' Held, Joseph, who never had issue, did not take a *fee tail*, but on his death the limitation over, good as an executory devise, vested in Medeef, the surviving son.

§ 8. A testator devises a tract of land to his daughter, H. L. 'and to her and the heirs of her body, and to them and their heirs and assigns forever,' and afterwards adds, 'if my daughter H. L. should decease, not having any lawful heirs of her body,' that then the land should become the property of his son D. L. Held, these words conveyed an estate tail to H. L. and not a life estate. The superior court decided differently; was in ejeetment. Court cited Doe *v.* Laming, 2 Burr. 1002; also, 3 Call, 342–354; 1 Hen. & M. 559; 5 Munf. 467; 2 Munf. 263; 1 Rand, 288–300, an estate tail converted into a fee simple by the statute of Virginia. 1 Rand, 194—205, Tidbal v. Lupton.

§ 9. Ejectment. Plt's. lessor claimed under the will of Elias Brevoort, in which he devised his real estate to his four children in fee, in four separate parcels, and provided if any of them should die without issue of their body or bodies lawfully begotten, the share of the deceased should be equally divided between the survivors. Two having died with and one without issue, leaving one surviving: held, the latter took the whole of the deceased child's share, in exclusion of the grandchildren of the testator: 2. Such a limitation is good by way of executory devise: 3. A will forty years old and forty years possession under it, need not be proved by the subscribing witness; is proper evidence as an ancient deed. Grandchildren not surviving children within the testator's meaning. Cited by the court, 16 John. 382; 20 id. 483; 2 Cowen, 333; 3 John. 297. Devising over to a living child of the testator limited the executory devise to take effect in a life in being when the will was made, and not to a general failure of issue. Jackson *v.* Thompson, 6 Cowen, 178—180.

CHAPTER CXXX.

ESTATE FOR LIFE.

§ 30 *con.* An estate for life only in Maryland, &c. Ejectment. Case stated. Agreed Jeremiah Belt, the testator, was seized of the land in question, and, Oct. 15, 1750, made his will and devised his estate to his wife for her life, then devised to his nephew, Jeremiah Belt, the lands in dispute, to quietly possess these lands after the death of his wife and not before; and if the said 4 Har & Mc H. 80 to 89, Belt's lessee *v.* Belt.

Jeremiah Belt shall die before he comes to enjoy the lands before mentioned, then they shall be the right of his eldest son Richard Belt; and if he die before he comes to the age of twentyone years, then the lands before mentioned to be the right of his second son, Edward Belt, and if he shall die before he comes to the age of twentyone years, then all the right of all the land, before mentioned, to be the eldest son's of Jos. Belt, son of Col. Joseph Belt, to them, their heirs and assigns forever: Gave away his personal estate to said Jeremiah and two others, and appointed him and his wife executors. Said Jeremiah Belt, devisee, as above, survived the testator's widow, and came into possession of the lands according to the devise, and claimed and held in fee till he died, in 1787. Under him the defts. claimed, and the plt's. lessor was heir at law of the testator, the son of John, the eldest son of Col. Jos. Belt. Sole question was if the plt's. lessor, *the heir* at law, or said Jeremiah's heirs were entitled. Judgment in the general court for the plt. for possession and costs. Deft. brought error in the court of appeals, which affirmed the judgment in favour of the heir at law. As Jeremiah, the devisee, survived the widow, the other devise to said Richard, Edward, and eldest son of Jos. Belt, to them, their heirs and assigns, did not take effect. It was contended the words 'to them, and to their heirs and assigns forever,' related to Jeremiah Belt as well as to the others. It may be observed that all the authorities cited and reported in this case, (decided A. D. 1799,) were *English*, and one, 2 D. & E. 225, after the American revolution.

1 Pick. R. 318 -323, Stevens & al. v. Winship.

§ 40. A writ of entry, &c. Held, 1. A devises a messuage to B for her life, she to repair, &c. and after her death, to C, and empowers B to sell all the estate, real and personal, if necessary, for her comfortable support. B has but a life estate, with such power: 2. It is incumbent on those claiming under B to show the necessity or need existed, and that the power was well executed: 3. If the contingency has happened or not is a jury question: 4. Evidence B, who was executrix, paid debts of the testator, has no tendency to prove she was in need.

10 Wheat. 204 -245, Wright, plt. in error v. Denn.

§ 41. New Jersey. Ejectment. James Page, Feb. 15, 1774, gave legacies in his will, and devised to his wife Mary, 'all the rest of my lands and tenements whatsoever, whereof I shall die seised in possession, reversion, or remainder, provided she has no lawful issue.' Also devised to her (making her sole executrix,) 'all and singular my lands, messuages and tenements by her freely to be possessed and enjoyed,' &c. Testator died seised without issue; his widow married again and had issue. Held, she had only a life estate.

Jackson v. Van Hoesen, 4 Cowen, 325 -329.

§ 42. Ejectment for a farm on the demise of Murphy and wife. Held, the words 'has bargained and sold,' in a convey-

ance sealed, pass an estate for life: 2. Tenant for life, if not restrained, may convey his whole estate, or any part of it: 3. If lands are conveyed to a natural person without words of limitation, an estate for his life passes, unless the grantor be tenant for his own life only, then only an estate for his life passes: 4. The reason of this distinction, long since was well settled in the books: 5. If tenant for years convey without limitation, his whole estate passes.

§ 25 *con.* His estate may be taken in execution for his debts. 16 Mass. R. 186–190, Roberts *v.* Whiting, was so taken after the death of his wife.

ART. 3. *Con.*

§ 3 *con.* And it cannot be denied by the tenant who holds under her husband, as in an action of dower, the tenant so holding was not allowed to show the husband was only colourably seised, that is under a deed from one Morse, made to defraud Morse's creditors.

ART. 4. *Con.* Kimball *v.* Kimball, 2 Greenl. 226–227.

§ 4 *con.* When it is said, in sundry cases, she shall have a third part of the profits of an office, &c., it must be meant a third part of the *net* profits after all expenses paid, that is, half as much *net* profit or income, as the heir or purchaser has, so if she has the third toll dish, she must pay a third of all expenses, as taxes, repairs, labour, &c. So 1 Greenl. 148–152, she has dower when she waives the provision made for her in her husband's will, but no part of his personal estate, if disposed of by his will. Mass. Stat. 1783, ch. 24, s. 8; ch. 39; 4 W. & M. ch. 2; 1805, ch. 90, s. 2.

§ 8 *con.* A wife cannot bar her right of dower by any release made to her husband during their marriage. 3 Greenl. 63–67, Rowe *v.* Hamilton. Nor, p. 50, can a wife contract to convey her lands, even though he join with her in the contract.

But, 2 N. H. Rep. 176, in Ela *v.* Card, held, the right of dower may be released by a deed executed by a married woman without being joined in it by her husband, and 507.

The right to dower rests in *action* only, and cannot be aliened so as to enable the grantee to sue in his own name, and if at his request, a surrogate has it measured to him, the proceeding is *coram non judice*, and void, though the heir or his guardian consent, nor can dower be recovered in ejectment, until it is regularly assigned. In an action for dower, *unde nihil habet*, to have a view, good cause, by affidavit, must be shown to the court. Dower allowed in an *iron ore bed, opened and worked* by the husband in his life time, and the court directed the admeasurers in assigning dower, to estimate the annual value of said beds, as a part of the value of the estate, that they at their *discretion* assign dower in lands set out by metes and bounds, and containing none of said beds, or to include any of them, describing them, if the lands in which included be not assigned.

17 Johns. R. 167; 20 do. 411.

Ostrander *v.* Kneeland, 20 Johns. R 276; 1 Cowen, 460 —481.

But if included, said beds within them need not be described, being part of the land itself assigned; or they may decide the prescription of the profits of any of said beds, by directing a separate alternate enjoyment of the whole at short periods in due proportions, or by allowing the widow a proportion of the profits, and to view said beds as they were when her said husband died. Cootes *v.* Chevis.

§ 12 *con.* Act Massachusetts 'shall not be construed, deemed, or extended, to bar any widow of a vendor or mortgagor of lands or tenements from her dower or right in or to such lands or tenements, who did not legally join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such her dower or right.' The act of March 10, 1784, (ch. 37,) s. 5, proviso, is in the same words.

Where an *award* bars dower by way of *estoppel.* See *Estoppel*, ch. 160, a. 2, s. 10. Though it passes not the title, and is good but in part. See Award, ch. 13, a. 15, s. 22; 2 Cowen, 638–652. Further points as to dower, 1, The right to dower, till assigned, rests in action only: 2. It may be released, but the widow cannot invest another with the right to an action to it: 3. An award will extinguish the right: 4. An award that an annual sum be paid in lieu of dower is valid: but 5, a further provision, that in default of payment she may enter, is void, as being repugnant to the former, the latter must be rejected but the former remain.

5 Cowen, 388-390. There can be no dower in an estate *per auter vie*, if not devised, is assets in the hands of the executor or administrator: 2. A buys land under an execution against tenant, by the curtesy initiate. A is tenant, *per auter vie*, and his widow is not dowable. If the mortgagor marry, and then releases his equity of redemption to the mortgagee, this extinguishes the mortgage, and there is no dower. The same act that satisfied the mortgage, by making the mortgagee's title absolute, annihilated the mortgagor's estate. Cited 5 Cowen, 168; 2 id. 246–286; 17 John. 123; 6 John. 290; 7 id. 278; 15 id. 450, Stow *v.* Tift.

1 R. L. 365, s. 4.

6 Cowen, 316-318, Jackson *v.* Dewitt.

§ 40 *con.* The principle is no dower in wild lands, though cultivated after the husband sold it. A third, that is, so much of the estate as to afford her a third of the income, and if in the estate of a *purchaser from her husband*, and a third after *deducting the improvements and increased value clearly produced by the money and labor of the purchaser;* not increased or decreased value produced by the plenty or scarcity of money, of war and peace, public prosperity or adversity, &c. See s. 80, &c.

1 Pick. R. 21.

§ 45 *con.* Count in dower, *unde nihil habet.* Plea in bar

that the demandant is an *alien*. Replication that she and her husband came to this State, (N. Y.) in 1786, with intent to become citizens, and resided here till his death in 1820; that he was naturalized August 29, 1803; and that he purchased the premises in question, not exceeding 1000 acres, January 4, 1804. Held, 1. That this purchase inured to the demandant's benefit, and a right of dower therein vested in her, and remains her right under the statute of 1802, (2 R. L. 542) March 29. This act enacted 'that all purchases of land made, or to be made, by any *alien* or *aliens*, who have come to this State, and become inhabitants thereof, shall be deemed valid to vest the estate to them granted; and it shall be lawful to, and for such alien or aliens, to have and hold the same, to his, her, or their heirs and assigns forever, and to dispose of the same, any plea of *alienism* to the contrary thereof notwithstanding; provided any purchase hereafter to be made, by any such alien, does not exceed 1000 acres.' When her husband purchased, January 1804, she had a capacity to take an estate; and that capacity never ceased to exist; her right to dower attached when he purchased, and she has done no act to divest herself of it. Judgment she recover. So far on the statute peculiar to New York, and those States which have enacted similar statutes: 2. Held, the alien widow of a natural born citizen cannot be endowed, independent of said statute: 3. By a conveyance to husband and wife they both become seised of the *entirety*, &c., as above: 4. A right to dower is an interest in lands contingent, while the husband lives, but is rendered absolute by his death: 5. But it is a right resting in action merely, and cannot be aliened so as to enable an assignee to sue in his own name: but 6, it may be released: 7. The right of dower is incident to, and inseparable from, the estate acquired by the husband: 8. Naturalization, merely removes the disability of an alien to hold, leaving his right to the government to enter, if he dies without heirs, or leaving *alien* heirs only: 9. Savage, C. J. 'it seems that an *alien* widow of a *naturalized* husband cannot be endowed.': 10. 'The naturalization of the husband does not naturalize the wife, nor such children as are above the age of 21, at the time of the naturalization of the father.' All thus stated 2 to 10, both included, are decisions on the general principles of the common law, as may be seen in other parts of this work, and common to 23 States, where not varied by statute enactments. Pleadings at large, and many authorities cited, and it is to be observed the writ demanded the difference of buildings and different sorts of land, as in England. 5 Cowen, 713, same case in error; judgment affirmed. A widow of an alien pur-

Vol. IV. Ch. 130. *Art.* 4. *Cen.*

Sutliff v. Fordy, 1 Cowen, 88—96

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chases under statute, 1 R. L. 542, takes her dower as *purchaser*, within the meaning of that act.

17 Mass. R. 564–566, Barker v. Parker, &c.

§ 63 *con.* Writ of dower. A mortgaged lands, and his wife released her dower. The right to redeem was sold on execution to B; before B entered, C, a stranger, paid the money due on the mortgage, and the assignee of it released to the mortgagor. Held, his widow was entitled to dower against B's assignees in possession. The court said, 'the mortgage having been paid, it is to be considered as never having existed.' She owes nothing to the tenants. See ch. 112, a. 5, s. 55, and 5 Serg. & R. 289, and s. 40, and s. 80, and s. 64.

3 Pick. 475–484, Gibson v. Crehore.

§ 72 *con.* *Assumpsit* for one third of the rents and profits received by the deft. of certain real estate; facts stated. Facts: November 18, 1814, A. Gibson, the plt's. husband, seised in fee, mortgaged to one Brooks. Debt, a note, for $15,000, and interest; plt. joined and released her dower. July 10, 1816, A. Gibson died, and E. Farley and J. Gibson, were appointed administrators on his estate, and represented it insolvent. Commissioners were appointed; and Brooks presented his note to them, 'who allowed it as a debt existing against the estate, and returned it in their report to the judge of probate. Administrators paid the other creditors 90 per cent. on their demands; but before any distribution was made, the amount of the note to Brooks, was struck from the list of claims. November 26, 1817, the administrators, under a license from the Supreme Judicial Court, for the consideration of $4300, conveyed to the deft. all the interest A. Gibson, the mortgagor, had when he died, in the estate in question. Then the deft. gave them a bond to pay the debt to Brooks. Deft. immediately notified the tenants of his purchase, &c., and they consented to pay the rent to him, and did so. January 8, 1818, Brooks, the mortgagee, in consideration of $14,540, paid him by the deft., executed a deed, purporting to *assign* to him and his heirs, the mortgaged premises. The same day the deft. mortgaged the same to John Parker, conditioned to pay $6000, in 18 months, with interest. April 6, 1821, this was paid, and the mortgage discharged by Parker. This left the deft. assignee of Brooks as above.

February 13, 1818, the debt mentioned in the mortgage to Brooks, being due and unpaid, (unless extinguished as above) the deft., in the presence of A and B, two of the tenants, entered on the mortgaged premises for the purpose of foreclosing the mortgage, and took possession; ever after kept possession, and received the rents, &c. No memorandum of his entry, &c., was entered in the registry of deeds, nor any notice

thereof given, except the deft. mentioned it to Farley and A. Cushing, conversing on the subject. No part of the debt was paid or tendered to Brooks or the deft., unless by legal operation on the facts agreed. The plt. never demanded her dower, &c. except August 21, 1817, she demanded of the administrators and of the heirs of her deceased husband, to set-off her dower in all the real estate of which he died seised and possessed. Plt. nonsuit. The deft. first purchased A. Gibson's right to redeem, of his administrators, under a license of court. He afterwards paid Brooks, the mortgagee, and took an assignment of the mortgaged premises. In fact he purchased these and the equity of redemption, and took and kept peaceable possession. How was it possible to suppose there was an extinguishment of the mortgage? As to three years possession, this could not be in question in the plt's. action, but only on a bill in chancery.

§ 78 *con.* Therefore if the tenant die after she has judgment, and before her execution issued, and after his death the sheriff assigns her dower, the assignment is void; and if she bring an action for use and occupation, against one in possession, he may show she has no title. She has none nor right of entry, till her dower be legally assigned. The occupier is liable to pay rent to the true owner. 16 Mass. R. 191–193; see ch. 112, a. 2, s. 1; ch. 114, a. 27. s. 2.

§ 80 *con.* This was a bill in equity, brought by the plts. for her dower in the estate of her former husband. Their claim was opposed on the ground she had released her dower. The points decided, were, 1. A deed executed by husband and wife, but containing no words of grant by her, does not convey her estate in the land, (a fee) nor her dower: 2. Her release, made by her alone, long (eight months) after his conveyance, for a *new* consideration, is not in Massachusetts an extinguishment of her dower, though he sold with general warranty: 3. The parties to a deed are estopped to deny the consideration stated in it, though married women: 4. But it seems another auxiliary consideration may be proved: 5. A and B, partners, A buys land in his name, parol evidence is admissible to prove it a joint purchase, and A is held trustee of a moiety for B; so a *resulting* trust: 6. Where the husband is trustee there is no dower: 7. Where improvements on the land are made by the purchaser from the husband, dower is to be 'according to the value which it would have had at the time of the assignment, if no such improvements had been made.' See s. 40, that is, separate and deduct whatever increase in value, has been made by the money and labor of the purchaser, and dower is one third of the estate,

3 Mason, 347–377. Powell & wife v. The Monson and Brimfield Manufacturing Company.

and all other increase; or by increase of population, by public prosperity, by long peace, by decrease of taxes, &c. in short all increase no way caused by the acts and doing of the purchaser. And the increase by his acts, doings, and expenditures, appear to me to be very proper for the inquiry of a jury under the discretion of the court. As to the first and second points above, see s. 12. The Massachusetts acts of 1644, 1697, and March 10, 1787. These acts require her *to join with him in the deed.* As to the third point, see the word *Estoppel* in the index, Deeds, &c. ch. 86, a. 4, and especially, s. 39, ch. 93; ch. 114, a. 4, s. 8, 9; ch. 177, a. 9, s. 1; ch. 178, a. 19, many cases. Fourth point the same authorities; see the words Trustees and Trusts in the index, especially ch. 114, a. 17, s. 1 to 22, resulting trusts. Fifth point, a clear case and ante. Sixth, supported by American decisions cited in this article, especially in Massachusetts, except they refer to the time of the husband's *alienation*, when that time or the time of the *assignment* was not material on the facts in the case. 3 Mason, 459–468, same opinion. A mortgage is not an alienation so as to preclude dower: 2. The main mill, wheel, and gearing of a factory, attached to the factory, and necessary for its operations, are fixtures, and real estate, to which the right of dower attaches.

2 Serg. & R. 554.

By usage and law of Pennsylvania, a woman has dower in a *trust* estate. There proof of actual marriage is not necessary to entitle her to dower; cohabitation and reputation are sufficient to prove a marriage, especially of ancient date. 2 Serg. & R. 475.

Sugden on Powers, 183, Am. Ed. of 1823.

§ 94. *How dower is excluded in a fee by appointment:* as where A enfeoffed B and his heirs, *habendum* to him, his heirs, and assigns, to such uses as he should appoint, by deed or will, and in default of, and until appointment, to the use of B, his heirs, and assigns. B by his power appointed in fee, and his widow sued for dower, and held, she was barred. For her it was agreed her husband was in at common law, and that the power was void: he was till he used his power, and if he had never used it she would have had dower. Thus, an estate may be conveyed to a man, in fee simple, when married, and yet his wife be barred of her dower or not, at his pleasure. Some, however, hold there is dower in such a case, and that the power is void.

Moreton v. Lees.

1 Pick. R. 189 —191.

§ 95. The assignment of dower need not be in writing; hence need not be pleaded as so made. Plea assigned part, as to part she released her dower, part *non tenure*, being the remainder; she has it by law, not by contract, and it may be set out by metes and bounds, as well as by deed.

§ 96. Action for dower in land of her former husband. Held, a guardian may assign dower. By an assignment under seal, between the widow and guardians of the heirs, the whole of one parcel of land was assigned to her for her life, to be holden in full satisfaction of her dower, and subject to all the conditions and liabilities, and with the privileges and incidents of dower. The land assigned proved to be under mortgage. Held, to be an assignment against common right, and that she was barred by it, as against an innocent purchaser of other land of the former husband. Vol. IV. Ch. 130. *Art.* 4. *Con.* 1 Pick. R. 314–318, Jones & ux. v. Brewer.

§ 97. The assignment of dower, by commissioners, under an order of court, at the instance of one of several coheirs, binds the widow, if full and just, also the coheirs, even if minors: 2. At common law the heir had power to assign dower, without resorting to any court,—this power remains: 3. If the widow keep possession of the whole, under pretence the assignment of dower was not legal, she will be accountable to the heirs for the rents and profits of all, except her dower land. 2 Rand. 422–422.

§ 98. *Dower in parcels.* If the husband convey to two, in *severalty*, his widow has dower in each distinct parcel of land: so if he alien to one, and he to two or more *separate parcels*, same rule: 3. Tenants in *severalty* of *distinct* parcels of land, cannot be joined in a writ of dower: 4. In dower, *several tenancy* must be pleaded in an abatement; *non tenure* may be pleaded in bar. The action was commenced against two tenants in *severalty*; one of them in dower, one was defaulted. Porter *v.* Wheeler, 13 Mass. R. 504; 3 Chit. Pl. 601; Parker *v.* Murphy, ch. 178, s. 13, s. 16; 20 H. 3 c. 1. 1 Greenl. 30–57, Fosdick *v.* Gooding & al.

§ 99. Special pleadings in dower—forms. Declaration as in England, one third part of seven messuages, seven barns, seven stables, seven gardens, seven orchards, one hundred acres of land, one hundred acres of arable land, one hundred acres of meadow land, one hundred acres of pasture land, one hundred acres of wood land, and one hundred acres of land covered with water, with the appurtenances in the town of Gates, &c. 1. Plea, the husband aliened in his lifetime, and *tout temps pris*, &c., as to part, &c.: 2. As to the residue, non tenure; as to that prays judgment of the writ, &c.: 3. *Ne unque accouple* in loyal matrimonie. Held, the plea of alienation and *tout temps pris*, under the act (Sess. 29, ch. 168, s. 1,) may be pleaded after a general imparlance, and one being so pleadable, draws after others not so pleadable standing alone, but only before. *Ne unque accouple*, and alienation with *tout temps pris*, may be pleaded together. Where the husband aliens in his lifetime, the statute gives only the value of one third of the land, at the time of the alienation. Hence, arises the necessity of pleading the alienation, and averring *tout temps pris*; motion denied. Allen *v.* Smith, 1 Cowen, 180–189.

Vol. IV. Ch. 130. *Art.* 2. *Con.*

These pleadings appear to be correct; and *quere* if the pleadings in Massachusetts are so, when the husband so alienates. Except stating as above, the different kinds of property may not be necessary in this country, where no such distinctions are usually observed in deeds, wills, or pleadings.

§ 100. Such seisin of the husband, whereon his heir can recover in ejectment, his widow can recover in dower. Jackson *v.* Watervill, 5 Cowen, 299–302.

Art. 5. *Con.*

2 Rand. 563—594, Taylor v. Moore, &c.

§ 22. *A settlement after marriage valid:* as where a married woman relinquishes her dower in lands, under a promise that other property shall be settled on her as a compensation, such settlement will be good, though made after the relinquishment: 2. If the property settled much exceed in value the value of the dower relinquished, the deed is set aside as to the excess, and supported as to the residue: 3. If the deed of trust be impeached, as fraudulent, the trustee may be a witness if he has no interest in the support of the deed, and no participation in the alleged fraud. The bill was filed by a creditor of the husband, alleging the said deed was made to cover the property, slaves, &c., from his creditors, who was then greatly indebted. The promise, &c., from the husband and to his wife, was valid in chancery. Payne, the trustee, advised the settlement, and his answer shows he felt much disposed to support it. This, however, was deemed not an objection to his competency, as witness in the cause to support the settlement. The plt. was a creditor when the deed was made; the consideration in the deed was £1000; evidence was admitted to prove another: deed held valid in the lower court, confirmed in the supreme court, (two judges against one) so far as there was no excess in value of the estate conveyed in trust, over and above the value of the dower relinquished; and 1. Har. & Mc H. 568.

Art. 6. *Con.*

§ 2 *con.* Same principle 4 Har. & Mc H. 300; and 15 Serg. & R. 8, Train *v.* Fisher, held, that when the limitation of a chattel is made by words, which, if applied to a *freehold of inheritance* create a feetail, in a *personal* estate, the whole interest vests absolutely in the first taker.

Davison v. Davison, 1 Hawks, 163—180.

§ 22. A, bequeaths *personal* estate to his daughter B, but if she 'dies *without having heirs*, then, and in that case, the property bequeathed to her, shall be divided into four equal parts between the children of C, D, and E.' Held, the limitation over is too remote, and that the whole estate vested absolutely in B: If words be used as to *personal* estate, which, if applied to *real*, would create a feetail, they give the absolute property in the *personalty*, and the limitations over are void: 3. The exception is, that if it appears from any clause or circumstance in the will, that the testator intended to give it over only in the

case of the first taker had no issue living at the time of his death, then, the subsequent limitation will be good as an executory devise, and not too remote.

CHAPTER CXXXI.

ESTATES BY ALIENS.

§ 14. British subjects born before the revolution, are equally incapable with those born after, of inheriting, or transmitting the inheritance of lands in this country: 2. The treaties of 1783 and 1794, only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired: 3. Actual possession is not necessary to give the party the benefit of the treaty, but the existence of the title at the time is necessary: 4. Where James Dunlap, an alien and British subject, came into the United States subsequent to the treaty of 1783, and died before the treaty of 1794, siesed of the lands in question, the title of his heirs was not protected by the treaties: 5. The doctrine of estoppel, or the principle of legal policy, which forbids the party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, especially when the vendee has not received possession from the vendor. It seems James Dunlap had no legal title when he died in September or October, 1794, leaving John Dunlap his brother and heir. The land James purchased between the treaties, he purchased when an *alien*, and so had no title, and when he died no title could descend to John, though a citizen. But 'had James conveyed or devised the property to John, the title would have vested in him, subject to the right of the government to seize the land; and the government would have confirmed that title.' As the case is, he had no title descended to him, as James, an *alien*, was incapable of transmitting title; so John had 'nothing on which the treaty could operate.' Though this does not require actual possession, it requires 'the existence of title at the time' the treaty was made. As to estoppel, see Estoppel, ch. 160, a. 2, s. 7.

7 Wheat. 535–551, Blight's lessee, *v.* Rochester.

§ 15. *How an alien may take by grant and hold till office found;* as 11 Wheat. 332–360, Doe *v.* Robertson & al.: he may take by grant from the State or a private citizen, and may hold the same real property till his title is divested by an inquest of office, or some equivalent proceedings. The title of aliens by the Virginia act of 1779, ch. 13, and Kentucky act of 1799. Who is one; 5 Barn. &. Cres. 771.

§ 16. Americans, aliens in England, &c.; as 2 Barn. & Cres. 779 to 798: children born in the United States of America, since the recognition of their independence, of parents born

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there before that time, and continuing to reside there afterwards, are *aliens*, and cannot inherit lands in England. Doe on the demise of P. Thomas, and Francis Mary his wife v. Acklan. Mrs Thomas was born in 1784, in the United States, of parents then living in them, but British subjects before the separation, thereby become aliens to England. Mrs Thomas, if not such alien, was the heir of the person last siesed of the land in question. See 7 Wheat. 535–551, above.

Art. 3. *Con.*

§ 1 *con.* By this treaty of 1778, the title having once vested in a French subject here, was not divested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800. 10 Wheat. 181–192, Banks v. Carneal.

Art. 4. *Con.*

§ 3 *con.* 3 Pick. 224–226, Commonwealth v. the heirs of André, &c., an *alien*, held, it was estopped, in an inquest of office, to demand lands of the heirs of A, an *alien*, and they being *aliens* also, because the legislature had granted the lands to A.

2 Mc Cord, 187.

§ 13. 1 Mc Cord, 294, held, where a father has been a citizen of the United States, his son is entitled to the privileges of citizenship, though born out of the limits of the United States: otherwise of a child born of a citizen mother by an alien father. An alien wife gave notice she intended to become a citizen of the United States, and took the oath, but died before duly naturalized. Held, her husband could not inherit land through her in South Carolina; and if the record of naturalization do not show such intention, the court will presume that the court which admitted the alien had evidence of that fact, as required by the act of congress of 1802.

2 Nott. & Mc Cord,

A devised land to his daughters, who were aliens in 1782. Held, they were entitled to take by descent under the treaty of 1794, a. 9.

2 Nott. & Mc Cord, 293—299, Scott, widow of W. Scott, Jr. v. Cohen.

Action of dower. A, seised of lands, dies, leaving no issue to inherit him, they escheat to the State rather than go to the aliens, but where there is any one of his blood capable of inheriting the fee of his lands, they go to that one in preference to all others, nearer in degree, who are aliens: as if A leave brothers and sisters, *aliens*, and the son of one of them is naturalized in the United States, that son takes all A's estate, and the widow has dower in it, of the one naturalized.

2 Rand. 276—294, Bargega v. Hopkins, &c.

§ 14. Persons born in foreign countries, of parents born in foreign countries, are not citizens of Virginia, and so cannot inherit lands there, though their grandmother was a native of Virginia, who moved to England before the revolution, married there, and resided in that country till after the peace, when she returned, and resided in Virginia till her death. Cause twice argued. Ejectment and demurrer to the evidence of the plt's. lessors, &c. They claimed as heirs of Lucy Paradize, who became seised under her father's will, in the year 1767. In 1769 she

was married, in England, to John Paradize, a native of that country, where she lived with him till 1788, when they removed to Virginia: soon went to England, there he died in Dec. 1795. She came to Virginia, and died there intestate, April 2, 1814. Defts'. wives were her neices: their husbands entered, &c. She had two daughters born in England; one died an infant; the other, Lucy, married there, April 4, 1787, Bargega, a Venetian nobleman. She died in Italy in 1800: her husband died there, 1807,—neither was ever in the United States. They had two children, the lessors of the plt., born in Venice, in 1789, and 1796. Judgment for the defts. The difficulty arose on the construction of a number of obscure statutes of Virginia; and said lessors not being *British* subjects, could not claim under the treaty of 1794.

§ 15. *Aliens in several States.* In Maryland, the title of an alien friend is good against every one but the State; 4 Har. & Mc H. 400. In North Carolina an alien cannot take lands by devise; 2 Hayw. 104-108; but p. 37, if he purchase lands his title continues in him, till office found. He cannot maintain ejectment, but in possession; he can trespass; 1 Hayw. 485. Kentucky aliens cannot take by descent; Hard. 61. After the confederation was adopted, an alien, who became a citizen of one of the United States, thereby became a citizen of Virginia, (so of Kentucky,) and so as to be able to hold land there. 3 Litt. 476.

§ 5 *con.* So the laws of France deny the right of expatriation. See Edicts of 1650, 1676, and of 1784. Art. 6. Con.

§ 9 *con.* Two cases like this of Williams so decided in Boston, in 1794: one the case of Jonathan Nutting, the other the case of George Batterman.

§ 1 *con.* Trespass, assault and battery in common form: two pleas, alienage, &c. Held, 1. In a plea of *alien enemy* the deft. must negative or affirm all the facts that are required to bar the plt's. action: 2. Deft. must state, not only the plt. is an *alien enemy*, but that he had not the license of the government to remain here: 3. During the war of 1812, deft. must affirm, in his plea, the plt. had been ordered off by the executive of the United States, as, by an act of congress, an alien enemy is permitted to remain in the country till he is ordered to depart by the executive. See Casseres *v.* Bell, s. 2, and s. 3, Clarke *v.* Morey. This is imposing much of negation on the deft. when so much of the affirmative belongs to the plt. Art. 7. Con. 1 Rand. 272-276, Bagwell v. Babe.

§ 5 *con.* It will be observed in this case that Jeremiah Dower, the *alien*, was *dead*, when his daughter claimed his share. There is a similar decision, that the 11 and 12 Wm. 3, ch. 6, is in force in Maryland; but the *alien* ancestor was *alive* when his daughter claimed in this case. A died seised 9 Wheat. 354-361, Mc Creery's lessee v. Somerville.

Vol. IV. Ch. 131. *Art.* 7. *Con.*

of lands in Maryland leaving no heirs but a brother B, who was *alive* and remained an *alien*. B had three daughters, native citizens of the United States. Held, they could not claim title by inheritance to their uncle's estate, through B, their father, he being *alien* and still *living*. 'This statute gives no other capacity than would exist if the parents were natural born subjects.'

Jackson v. White, 20 Johns. R. 313.

§ 18. As to aliens. A came from England in 1774, and resided in New York, and was an officer in the *British* army: was in 1776 arrested as a person disaffected to the American cause, and in August or September, 1776, a prisoner on parole, and so remained at Albany till December or January following, waiting for a passport to join his regiment, when he either joined the British army or went to England, where he died about A. D. 1800, then a general in the *British* service. Held, he never became a citizen of New York after July 4, 1776, but that he continued a *British* subject, and could not take lands by descent from his brother, who died in 1792.

CHAPTER CXXXII.

ENTRY AND POSSESSION.

Art. 3. *Con.*

§ 12. 1 Pick. R. 318, 328. A remainderman is not obliged to enter for the forfeiture by tenant for life and at her death a new right of entry accrues to him.

Art. 6. *Con.*

4 Rand. 468-477.

§ 1 *con.* One tenant in common may have this writ of forcible entry against one who has no interest in the land, for the whole of it, without naming the other tenant: 2. Under the Virginia act of 1814, the mortgagee may obtain possession of the mortgaged premises after forfeiture: 3. This act gives a civil remedy for the recovery of immediate possession of the premises in certain cases, even where no force occurred. The jury were sworn 'to try whether the deft., against the consent of the plt., holds possession of the tenements mentioned in the complaint filed in the cause, whether the deft. hath so held possession thereof against the consent of the plt. for three years next before the exhibition of the said complaint, and whether the plt. has the right of possession in the tenements aforesaid.' The verdict for the plt. followed the oath. The complaint was by the survivor of two mortgagees for the whole against the mortgagor. The plt. recovered on the third section of the said act.

2 N. H. Rep. 550.

The plt. must state he was seised of the premises or possessed thereof for a term of years, and that the entry was with a strong hand.

§ 19. Inquisition abated as to the detainer, and affirmed as to the focible entry. 1 Har. & Mc H. 428–434: returned to the provincial court on *certiorari*. Trial below by jury on 8 H. 6, c. 9; 31 El. c. 11. Many authorities cited—all English. April, 1772. VOL. IV. CH. 132. *Art.* 6. *Con.*

Moore *v.* Massee, 3 Litt. 296. A warrant of forcible entry need not state the boundaries of the land; and a recovery in trespass is admissible in evidence, on the trial, of a writ of forcible entry on the plt's. part. But p. 295, one to have this warrant must have title when the entry is made; an after purchase is not sufficient. 1 Marsh. 333: if a man, by a writ of possession, is turned out, who was neither party nor privy to the judgment, he has his remedy.

§ 1 *con.* But in ejectment the plt's. lessor sues, on possession, he must prove twenty years' *uninterrupted* and *exclusive* possession of the land. 4 Har. & Mc H. 72; also 123. ART. 7. *Con.*

§ 16. *Title in Connecticut on fifteen years' adverse possession.* Action of disseisin final on the rights of the parties. Plea, nul disseisin. Verdict below for the original demandants, Williams and others, tenant excepted on numerous points of law. Facts: the demandants claimed the estate by purchase from the administrator of William Dudley, at a sale made by him to pay his intestate's debts. Said William Dudley's title was thus; his father, Thomas Dudley, was possessed of the premises as part of the Dudley lands and died possessed in 1769, leaving seven children, William, the oldest, and about fourteen years old. On the father's death, Joseph Mayhew, guardian of William, entered into possession of the Dudley lands, and of the demanded premises as parcel, taking the rents and profits, in his behalf, during his minority. William, when of age, entered and occupied the same, taking the rents and profits to his own use, till he died in the year 1786—all his brothers and sisters being then living. During William's life no other person claimed any right to enter or occupy the premises, except that his mother used to receive one third of the rents and profits till she died in 1783. During his life, and while in possession of the premises, William always declared that he held them *only for life*, so would not allow any improvements on them at his expense; no leases were made by him except for short periods; and no attempt was made by him to sell or convey the premises; and he declared he had no right to sell them, and that on his death they would descend to his son, Joseph Dudley, under whom the tenant, Ricard, derives his title. No administration was ever taken on Wm. Dudley's estate, in Connecticut, till the year 1814, and it was then declared insolvent; and in 1817 the 7 Wheat. 59-122, Ricard *v.* Williams & al. in error.

Vol. IV Ch. 132. *Art.* 7. *Con.*

lands in controversy were sold by the administrator, by order of the court of probate, for the payment of the debts, found due under the commission of insolvency.

To rebut this title of the demandants, and to establish his own, the tenant proved William Dudley died intestate leaving seven children: Joseph Dudley, the eldest, and a minor. On William's death, the guardian of Joseph entered into possession of the Dudley lands, including the demanded premises, and used and occupied the same, receiving the rents and profits in behalf of Joseph, till he was of age, when Joseph himself entered into possession, claiming them as his own, taking the rents and profits to his own use, and holding all other persons out of possession till the year 1811 or 1812, when he sold the demanded premises, and the tenant, by direct, or mesne conveyances, under Joseph, came into possession, and has ever since held the premises in his own right. In 1811, Samuel Dudley, a brother of Joseph, claimed title to some of the Dudley lands possessed by Joseph, and brought an action of ejectment to recover them, but the action was compromised by Joseph's paying him about $2,000. About the same time Joseph settled with another of his brothers, but did not pay him anything. Joseph never admitted his brothers and sisters had any interest in the lands; and said he could hold them, and did hold them in the same manner as he held the lands in Massachusetts. The will of governor Dudley, which was admitted to probate in Massachusetts in 1720, was also in evidence, but neither party established any privity or derivation of title under it. The tenant rested his title on the presumption of a grant from somebody to William for life, remainder to Joseph in fee, or in tail. In this manner the lands were held and enjoyed fifty years before the commencement of the action. The court did not oppose this presumption; but decided for the tenant, rather against the demandants, on two other grounds: 1. That the evidence was, that William had only *a life* estate, as his conduct and declaration shew: 2. Even if he had a fee, the administration should have been taken and his lands sold within fifteen years after his death, his heirs being barred in that time by *adverse* possession, by the Connecticut statute of limitations, and so by analogy his creditors must be. This is the substance of the case. Many other rules of law were stated, some of which are placed under their proper heads.

Possession explained. Possession of land by a party, claiming as his own in fee, is *prima facie* evidence of ownership and seisin of the inheritance. But possession alone, unexplained by collateral circumstances, which show the quality

and extent of the interest claimed, evidences no more than the mere facts of present occupation by right. This may be under a lease for years or life: 2. But if the party shows a *title*, and is in possession under it, and by mistake of law supposes himself possessed of a *less* estate than he has title to, the law remits him to his estate by title: 3. Though it is a general rule a disseisor cannot qualify his own wrong, but is usually a disseisor in fee, yet as this is for the disseisee's benefit, that he may elect his remedy, the wrong may be otherwise viewed: 4. It must appear, the party found in possession entered without right, for if he enter legally, his possession is legal, and his entry and possession will be considered as limited by his right, as well as extended. Vol. IV. Ch. 132. *Art.* 7. *Con.*

5. ***Presumption of a grant***, arising from the lapse of time, may be applied to corporeal, as well as incorporeal, hereditaments: there is no difference in principle. In both cases they may be rebutted by contrary presumptions, and can never be, where all the circumstances are consistent with the non existence of a grant. Hence they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant: 6. Generally the presumption of a grant is limited to periods analogous to those of the statute of limitations in cases where the statute does not apply; where it applies the presumption is not generally resorted to.

Wm. Pinkney, speaking of grants, &c. *presumed*, justly observed 'it will be found in all these cases, that circumstances have been always shown to support the presumption, and that after a great length of time all things which the case shows, ought to have been done, will be presumed to have been done correctly. But in this country, where all the land titles are recorded, the presumption of a grant cannot be so easily indulged.' 'It must be presumed, first, the deed was made; and secondly, that it had been lost.' The easy and ready manner in which many of our American judges and lawyers, *even without a jury*, have slid into this presumption of twenty years, is not a little surprising.

§ 9. If a tenant make improvements *after* sued for the recovery of the land, and it is recovered, he is not entitled to a deduction therefor; and a mortgagee can only keep in repair. The improvement was digging a well deeper and new building it by a mortgagee. Art. 8. *Con.* 2 Pick. 503, Russell v. Blake.

§ 19. It is best for the lessor of the plt. in ejectment, to bring, in his own name, trespass for the *mesne profits*, especially if the tenant received them before the demise, as the nominal plt. can recover only those received after it. In fact the plt's. lessor, and the tenant in possession are the real parties. See

sect. 6 ante; see ch. 172, a. 6, s. 15; see 5 Cowen, 33, effect of a writ of error.

If the plt. recover on a writ of entry, his seisin, this is no evidence he is entitled to the mesne profits for the reason following.

§ 20. Trespass *quare clausum fregit*, is brought solely for an injury to the plt's. *possession*; hence clearly he must shew *possession*, in order to recover; this he does in *ejectment*, that respects only possession by the confession of *entry*. But in a writ of *entry*, which respects only the *seisin*, if the plt. recover, he recovers only that, and this affords no proof an injury to his *possession*; hence it follows the plt. to recover in trespass the *mesne profits*, must first prove his possession, actual or constructive, by his entry; and then his being ousted by the deft. or one under whom he claims. So far the plt. can recover damages for the *ouster only*. To recover for the wrong from its commencement, he must regain possession by action or reentry; having done this, the law aids by a sort of fiction, which supposes him in possession the whole time of the injury, and he sues in trespass with a *continuando*. When the plt. has entered and regained possession, whoever in the mean time takes the rents and profits, takes them wrongfully. And see Liford's case, 11 Co. 51, s. 2, s. 11, ante; 9 Johns. R. 27, Case *v.* Shepherd; 11 Mass. R. 519, Starr *v.* Jackson; 9 Johns. R. 61.

§ 21. But it is sufficient if the demandant in his writ of entry, count on *his own* seisin, prove it and recover; but if he counts on the seisin of *his ancestor* and the ouster of *him*, the wrong dies with him: If in abatement, intrusion or deforcement, he shews no seisin. In such cases the plt. must make an entry, if he have a right to enter, and consider himself as ousted, and prove his entry and deforcement, recover and in order to have trespass for the mesne profits. *Bona fide* purchaser allowed his permanent improvements.

4 Cowen, 168.

§ 22. In Liford's case the *feoffee* of the disseisor coming in *by title*, he is not liable in trespass for the mesne profits. Same in New York. 3 Caines. 261, Case *v.* De Gow; 12 Mass. R. 46, Fletcher *v.* McFarland. But, 2 Pick. R. 473, Emerson *v.* Thompson, 1 Pick. 87, Wilder *v.* Houghton.

In fact if the plt. has no right to enter and take possession, he has no claim to the mesne profits, as then the legal right of possession is in the other party. And if the plt. have a right to enter and take possession, and does not do so, it is his own fault, and it is doubtful if the plt. has any right to the *mesne profits* in law or equity, except to those that accrue after he gains possession; and 5 Cowen, 261, 264, 408, 410.

CHAPTER CXXXIII.

ESTATES FOR YEARS, AT WILL, SUFFERANCE, AND OTHER CHATTEL INTEREST.

2 N. H. Rep. 250—252. A term for nine hundred and eightyfive years, passes in a will, under the expression personal estate. But, 2 N. H. Rep. 387, a term for years may be appraised and set off on execution.

The minutes of a lease contained these words—'It is stipulated and conditioned that the said G. G. shall not underlet.' Held, this created a condition, on the breach of which the lessor had ejectment, though there was no clause of reentry. 1 Manning & Ryland, 694.

ART. 2. *Con.*

Trespass *quare clausum fregit*. April, 1819, Paige, as one Bond's agent, by *parol*, leased to the plt. some land and a dwellinghouse on it, for one year, reserving rent. The plt. went into possession, and, Sept. 30, 1819, Paige, aided by the other defts. forcibly entered the house, without the consent and against the plt's. will, and removed the plt's. wife and property therefrom into the highway, Sept. 17th or 20th, Paige, as Bond's agent, gave notice to the plt. to quit. Held, by the stat. 1783, ch. 37, s. 1, all *parol* leases have the effect of leases at will only: 2. A tenant at will is not entitled to notice to quit: 3. But he is to be allowed a reasonable time to remove his family and property: 4. What is a reasonable time is a question of law: 5. It seems in such case the door must be open or partly open: 6. The judge who tried the cause thought ten days were sufficient notice; a majority of the court thought otherwise. See ch. 178, a. 33, s. 13, Coffin *v.* Lunt. Opinion of Putnam J. 2 Pick. R. 71–79, in Ellis *v.* Paige, &c. 1 Pick. R. 43–50, Ellis *v.* Page & al.

§ 12. But, 16 Mass. R. 443–446, Johnson *v.* Carter, trespass *quare clausum fregit*. Held, 1. If the deft. plead a *license*, and issue is joined, evidence that proves a *lease* will not support the plea: 2. A license from a guardian to occupy, &c. the land of his ward, expires at the guardian's death.

ART. 3. *Con.*

§ 2 *con.* A leases cattle to B for years, to be taken back within the term by A if he think them not safe in B's hands. A cannot reclaim them without notice: 2. If seized on execution against B, A cannot have replevin *within the term*, as he has no right to the possession: 3. Leave to amend is granted at the court's *discretion*, so no bill of exceptions lies; was replevin for a cow and a pair of steers, against a deputy sheriff. Plea the property of the cow was in one Benj. Read, and of the steers in one Leon Read. Traversed and issue. Even trover requires the immediate right of possession. Ward *v.* Macauley, ch. 77, a. 8, s. 18; ch. 172, a. 1; Gordon *v.* Harper, ch. 77, a. 5, s. 1; a. 9, s. 33.

VOL. IV. CH. 133. *Art.* 4. *Con.*

§ 10 *con.* If a joint tenant or tenant in common sue for the whole, shall not be nonsuited, if entitled to less, but recover the part to which he proves title. 1 McCord, 161; 2 Bay 457–461.

2 N. H. Rep. 121, and 163–165, Coon *v.* Brickett.

§ 15. So a condition of reentry, in a deed or lease, is waived by continuing to treat the grantee or lessee as before the breach. Trespass *quare clausum fregit* against the deft. for taking away garden vegetables, September 9, 1818. Plea, not guilty. The plt. owned the close, and April 1, 1817, leased it for five years to the deft., at $50 rent, a quarter, and he gave twenty notes to pay the rent, &c. Condition, on failure, to pay at any time, &c. the plt. might reenter and the lease be void. Deft. entered, and remained in possession till August 17, 1818, when he quitted; and a quarter's rent due in July 1818, not being paid, the plt. took possession of the house and held for non payment of the rent. No proof he demanded it when it became due, or on the premises. Before September 9, the deft. paid said quarter's rent due in July, and the plt. accepted it, and gave up the note, &c. Judgment for the deft. on the ground that acceptance of the rent *before* or *after* reentry for condition broken, is a waiver of the breach for which is the reentry. *Quære*, is not the distinction the acceptance of rent *accruing after* the forfeiture. See ch. 178, a. 14, s. 17., and art. 33, and many authorities there cited and referred to. As the court waived the want of a demand of the rent due in July, the case turned on the effect of *accepting it*, after the forfeiture accrued and after reentry therefor, and after the lease, by the terms of it, had become void. As every act of the plt. related to rent *accrued before* the forfeiture, and in no sense to rent accrued *after*, there does not appear anything done to restore a lease forfeited and *ex vi termini* become void. The plt., by accepting the rent, only admitted, *when it accrued*, the lease existed, and had he accepted rent accruing *after* the forfeiture no doubt he had waived it, for thereby he must have admitted the lease continued. It is by no means the same thing to accept such rent *before* reentry and *after*.

CHAPTER CXXXIV.

ESTATES IN COMMON.

ART. 1. *Con.*

§ 11 *con.* Where parties purchase an estate *jointly* for the purposes of their trade, it is in equity an estate in *common*, in England; and in Virginia, where the *jus accrescendi* is abolished; it is so at law as well as in equity. 2 Rand. 183–189.

§ 14. Writ of entry. The plts., the inhabitants of the towns of Rehoboth and Seekonk claimed as tenants in common. Held, they could not join in this writ: 2. Where one town alone has right the court will allow the name of the other to be struck out: 3. The grant of the herbage or feed does not grant the soil so as to support this action: 4. The proprietors of common land voted that the income of it should be devoted to the support of a school in the town wherein it lay, and that it should be leased, from time to time, forever, by the selectmen. Held, this was a grant, and that the proprietors could not rescind their vote. Hunt, deft. Vol. IV. Ch. 134. *Art.* 2. *Con.* 1 Pick. R. 224—229.

§ 9 *con.* 1 N. H. Rep. 42–43. Nor can one share be set off on execution by metes and bounds; and 12 Mass. R. 348–474. Art. 6. *Con.*

§ 14. 17 Mass. R. 282–288, held, one tenant in common may make a valid lease for a year of a specific portion of the common property; if by parol, it gives an estate at will only.

CHAPTER CXXXV.

ESTATES IN REMAINDER AND REVERSION.

§ 4 *con.* A limitation over, after an indefinite failure of issue in the first taker, is a contingency too remote and void. 4 Rand. 547–553. Art. 3. *Con.*

§ 6 *con.* 2 Jacob & W. 81–92, Marquis Cholmondeley *v.* Lord Clinton, held, 1. If the time in which a remainder in a deed is to vest, is not ascertained by the limitation itself, it vests immediately in consequence of the legal presumption in favor of *vested* estates; but that presumption may be rebutted or controlled by the intention collected from the recital or any other part of the deed: 2. Where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the deed: 3. An imperfect limitation must be construed by the meaning and intention collected from the whole of the deed taken together: 4. In construing a deed, legal presumption can only prevail in the absence of a contrary intention, or where that is not manifested with sufficient clearness: 5. Words of description are to be construed according to the intention, if clearly manifested on the face of the deed, though contrary to their correct technical meaning. P. 113. 6. The effect of a limitation in a deed which, taken by itself, would *prima facie* create a *vested* remainder, will be construed and controlled by a contrary intention clearly manifested. Art. 5. *Con.*

Vol. IV. Ch. 135. Art. 5. Con.

§ 14. Where a husband conveys the property of his wife with warranty against the claims of *himself* and *his* heirs, his children, deriving title from their mother will not be affected by the warranty. The doctrine of collateral warranty examined, but imperfectly. 2 Rand. 549–562.

Art. 6. Con.

§ 1 *con.* The American cases are but very few, in which powers are created, especially in relation to the statute of uses. As one proof, as late as the year 1823, the industrious American editor of Sugden on Powers found American cases only for a few notes, in all about two hundred lines; and the few American decisions to be found on this subject, are by no means uniform in relation to estates, and it is to be hoped we may never run into the almost total uncertainty of the English land titles, growing, in a great measure, out of created powers in deeds, wills, fines, &c., of appointments and limitations *to uses and in trusts*, &c., and out of the revocations thereof. For the justness of this remark we may safely appeal to Powell, Sugden, &c., to English decisions in the last seventy or eighty years, and to numerous acts of parliament found necessary to disentangle and confirm private titles.

'Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory on the conscience of the party trusted,' said Lord C. J. Wilmot, Wilm. 23. This well settled rule does not hold where powers are in the nature of trusts or blended with them. 1 W. Bl. 123 to 186, Burgess *v.* Wheate, and cases cited. 3 Ves. Jr. 513–515, Warneford *v.* Thompson; 3 East, 553–558, Hilton *v.* Kenworthy, and cases cited. When a power is in the nature of a trust, see 5 Ves. Jr. 362–368, Spencer *v.* Spencer, and cases cited; 8 Ves. Jr. 574; 4 Ves. Jr. 708–719; 2 Ves. Jr. 529.

6 D. & E. 396.

§ 4 *con.* 21 H. 8, c. 4, provided if lands be devised to be sold by executors, and part refuse to be executors, all sales by those who accept shall be valid, &c. *Cestui que use*, before the statute of uses, devised that A, B, and C, his feoffees, should sell the land: A died. Held, the survivors could not sell. *Quere*, if their proper names had been omitted, and they named only feoffees. Many cases cited; and 1 Cro. E. 26, Lee *v.* Vincent. Five sons-in-law empowered to sell (proper names omitted:) one died. Held, the four surviving could sell. One reason the four still answer the description, sons-in-law, in the plural number, and they had but a bare authority. And Cro. C. 382, Howell *v.* Barnes, was a devise of lands to wife for her life, remainder *to be sold by his executors*, named them, W. Clerk and R. Chesley. Clerk died. Held,

Dyer, 177.

1. The executors had but a bare authority: 2. That Chesley could sell. Some cases otherwise, as Dyer, 219; 1 Barn. & Ald. 608. The American cases generally agree with Howell and Barnes. See ch. 29, a. 4, s. 1; 13 Ves. Jr. 576; 10 East, 158.

4 Rand. 566—577.

Where an appointment is made, in pursuance of a general power, not prescribing the mode of appointment, it must be made in such a way as would pass the title, if the property belonged to the person making the appointment. A *naked* power given by law to an officer, or other person, must be strictly pursued, and especially if a forfeiture be involved, and he who acts under the power must show he has exactly pursued it, and that an officer, or other person, has exactly executed it.

pp. 585-597.

§ 13 *con. When an action is done by a power, it must appear, &c.:* as where, 1744, the general court empowered a committee to sell lands, which by deed they sold to twenty purchasers, &c., this deed appeared on the face of it to be made under a power, &c. that was matter of record. Held, the deed was not admissible, however ancient, as evidence of title to land, without the power or an attested copy of it.

4 Pick. 160—164, Tolman v. Emerson.

§ 21 *con. What is a power coupled with an interest?* This question often occurs, and is not easily answered in many cases. To constitute such a power there must be an *interest in the thing itself*, and not merely *in the execution of the power*: a power so coupled survives him who gives it. A has property, as a vessel, in him, he gives a power to B; now the property remains in A, unless it be conveyed with the power, and can pass out of him only by an act in his name; and if the property remains in A till his death, the law passes it to his representatives, and B cannot convey it, by the power, without doing it *in A's name, and as his act per alium*, this cannot be done after he is dead, and the power, and the vessel are not *coupled*, *united*, or *connected*, but remain separate. A owes C a debt, and conveys his vessel to B, with power to sell her, and pay C the debt, then the power and the property couple, and unite in B, and he may sell her in his own name, after A's death, and the property being thus in B, does not, on his death, pass to his representatives. B sells in his own name, as principal, but applies the proceeds according to the power and trust, he receives from A, and sells in his own name, but in pursuance of power, limiting the property as to pay all A's debts, or specified ones, &c.: this is every day's practice. But for B to sell and convey in his own name, and in his own act, it is clear the property must pass from A in his lifetime, to vest in B: if not so, clearly, B to convey, must exercise and use the power A gives him, in A's name, to pass the property *from A* to the purchaser. Th[illegible]

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never can be done after A is dead. The principle is otherwise as to *testamentary* powers: as if A bequeath property to B, to pay A's debt, the law passes the property to B for this purpose, and he is only to state and show the devise or bequest.

Authorities. Hunt *v.* administrators of Rousmanier, ch. 15, a. 4, s. 19, especially, and that chapter generally; so this a. 6, generally; Litt. l. 1, ch. 7, s. 66; 6 Com. D. 1; Willes's R. 103–106, Combe's case, 9 Co. 76; 2 Wood's Con., Appointments; Willes's R. 563–571, Co. Litt. 52, 6; ch. 112, a. 5, s. 6, Bergen *v.* Bennett; Sugden's Vendors, 481; Mitchel *v.* Eades, Prec. in Ch. 125.

§ 28 *con. And how the words among children must be construed.* A empowered his widow to dispose of certain slaves *among his children, as she should think proper.* Held, she could not give all to one child, nor wholly exclude any one, nor give any to grandchildren. That equity avoids any appointment not in conformity to this principle, and gives the property among the children and their representatives: Hudson *v.* Hudson's administrator, 6 Munf. 352, and 374; 2 Call, 520: so in the English books, every child must have a share; 2 Ves., Jr., 529–533, Malim *v.* Keighly; 1 Eq. Ca. Abr. 404, 405; 2 Ves., Jr.,640, 5 Ves., Jr., 849–862, Kemp. *v.* Kemp; and must be substantial, not an illusory share: 1 P. W. 149; 2 Vern. 513: but other words may exclude one or more, as 1 D. & E. 432–440, Swift *v.* Gregson; 5 Ves., Jr., 218; Ambl. 660, ch. 135;

§ 31 *con.* Though long doubted, it is now settled that a *feme covert* may execute a power given to her when sole: Rich *v.* Beaumont, 3 Bro. P. C. 308; 3 Atk. 711; 2 Ves. 64–191; 1 Ves. 303; see s. 49; Ambl. 468, Wright *v.* Englesfield; Ambl. 474, 565, 627; 2 D. & E. 684; but *quere* if she was a minor, or if any minor can so execute unless a mere instrument: 3 Atk. 710; Stra, 604; not a power *appendant;* Hearle *v.* Greenbank, 3 Atk. 695; and 1 Ves. 248; this involves his interest; but a power *strictly collateral* does not. Before the statute of uses a minor could not direct his trustee to dispose of the use, and the act gives him no new powers.

1 Jacob & W. 89.

§ 33 *con.* A devise to the testator's widow for life, to be by her divided among such of her children and their issue, as should be surviving at her death. She, by will, appointed a share to each of the surviving children of the testator, or in case of their deaths, to their children respectively, and another share to the children of a deceased child. Held, this power was well executed: p. 189, power to sell, &c., and p. 196: if one be empowered to sell, not implied the executor has the power.

2 Jacob & W. 431—434.

A bequest of £500 to A, for her life, and at her decease to divide it in portions, as she shall choose, to her children, and if she should die before the testatrix, to be equally divided

among her children. Held, A's children living at her death, were the only objects of the power, and as such, entitled to a share lapsed by the death of a child to whom it had been appointed: 2. A power to appoint the proportions in which definite objects are to take, tacitly includes a gift to them in default of appointment.

§ 42 *con.* Sudgen on Powers, 45–48. He seems to view powers *appendant* and *appurtenant*, as the same; also powers *collateral* and *in gross* the same. Sundry cases in which powers may be suspended, extinguished, or merged: see Sugden on Powers, 49 to 96; the cases involve very nice distinctions, and much uncertainty; and pages 560 to 582, Ed. 1823; see Beckett's case, 2 Rol. Abr. 262; Lane's R. 118; Sugden on Powers, 312 to 322.

§ 45 *con.* Where powers may *merge* or not: see several cases, Sugden on Powers, 81 to 96; especially Maundrell *v.* Maundrell, 7 Ves., Jr., 567; Goodill *v.* Brigham, 1 Bos. & P. 192–198; Clerc's case, 6 Co, 18, 19; Tickner *v.* Tickner, 3 Atk. 742; Roach *v.* Wadham, 6 East, 289 to 306; 3 Ves., Jr., 650 to 684, Cave *v.* Holford; Cross *v.* Hudson, 3 Bro. C. C. 30; Abbott *v.* Burton, 11 Mod. 181–185: in this case, after various decisions and opinions are considered, the best rule seems to appear, that is, that a remainder limited to a *feme covert in fee*, with a power to her during the coverture, to dispose of it as she should think fit, was a valid limitation, and that the power was not merged, but might be legally exercised. The power not being executed, the heir, on the part of his mother, recovered her old remainder in fee: but had the power been executed, it is plain the heir on the part of the father would have recovered the estate created under the power. Hence, her power to limit was not absorbed in her old estate in fee.

CHAPTER CXXXVI.

FORFEITURES, &c.

§ 11. Ejectment for one fourth of the south part of lot No. 10, in Glen's purchase. The deft. gave evidence to show that certain lands of David Colden, under whom the plt's. lessor claimed title, were forfeited by an act of attainder. Held, this was *prima facie evidence*, that the title to the premises in question, was once in David Colden; and that the plt. might, without farther proof of title in David Colden, proceed to deduce a title from him: 2. Where an act for vesting certain lands of David Colden, in C. Colden, referred to a location and enumeration of lands of David Colden, made, &c., and delivered to the com-

Jackson *v.* Cole, 4 Cowen, 587—599.

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missioners of forfeitures, and directed them to be appraised by such persons as the commissioners of forfeitures should appoint, and the appraised value to be paid either to the commissioners or treasurer, &c. Held, that as against the State, the location and enumeration thus adopted by the act, are conclusive that the lands mentioned in them, once belonged to David Colden: 3. An exemplification of the certificate of the appraisers, filed in the treasurer's office, having an endorsement by the treasurer upon it, that the original had been delivered to C. Colden, deceased, and it being shown that it could not be found among his papers, was held admissible in evidence, though it was the exemplified *copy* of a *copy*: 4. This copy having been furnished by the commissioners to the treasurer for her information, and his guide, under the act for vesting the land in (Colden) may be regarded as an original for some purpose, and especially as against the State, the treasurer having endorsed on it all he did under it: 5. Where a State officer, as the treasurer, does an act which would be a violation of his duty, unless certain terms and conditions had first been performed by an individual, as between the State and the individual, such performance shall be deemed *prima facie*, to have taken place: 6. The said act of April 21, 1787, vested said estate of David Colden in Cadwallader Colden, in trust for the children of David Colden, with power to sue mortgages, &c., and on certain conditions; as to pay the appraised value, and deliver on oath, certain papers, &c. The court thought there was sufficient evidence to prove the conditions had been performed, so that a conveyance from the trustee to the *cestui que trusts*, was to be presumed from the circumstances in the case, if necessary to vest the title in them. Jackson *ex dem.* Swartout & wife *v.* Johnson. The same *v.* Brainard, 5 Cowen, 74 to 106; the same forfeiture and points generally. An estate in trust not to use: see *Adverse* Possession.

Art. 9. *Con.* 2 N. H. Rep. 87.

If an execution be levied on goods of the same character with those attached, and which were turned out to the creditor by the attaching officer, instead of those attached, the attaching officer is discharged from any further liability to the creditor.

§ 2. *New York*,—as to what may be seized and sold on execution: growing wheat, see a. 16, s. 16, bank bills or money, and everything belonging to the debtor of a tangible nature, except mere *choses in action*, and articles expressly exempted by the statute, may be taken and sold under an execution; 17 Johns. R. 351; 12 do. 395; so the estate of *cestui que trust* by implication, a. 19, s. 1.

Personal property is bound by the execution from the time it is delivered to the sheriff: Cresson *v.* Stout, 17 Johns. R. 116; 19 do. 345; levied on or not, an after sale of them by the debtor, is void: Lambert *v.* Paulding, 18 Johns. R.

311; and a person in possession of land under contract for the purchase of it, has an interest in it that may be sold on execution: Jackson *v.* Scott, 18 Johns. R. 94; things exempted, 18 Johns. R. 400; 14 do. 434: Rye growing may be levied on, 17 Johns. R. 128: each farm, &c., must be described by itself; 18 Johns. R. 355, a. 16.

§ 3. Where the creditor in the execution bid off the debtor's goods, the sheriff may deliver them to him without receiving the money, and if the judgment be reversed, the sheriff is not liable; 19 Johns. R. 84; but liable if sold to a third person for the sales; do. 298. But if there be a dispute among creditors as to which is entitled to the amount of the sales, the sheriff may refuse a creditor's bid, unless he pays. 5 Cowen, R. 390—397, Russell *v.* Gibbs.

§ 3. But 2 N. H. Rep. 298, 299, Churchhill *v.* Warren, a mere seizure of property on execution does not devest the property of the judgment debtor: but if sufficient against one joint and several debtor, and the property is, before sale, returned by agreement of parties, this constitutes no bar to a recovery against the other debtor. Many cases both ways cited; and pp. 432–435: see 14 Mass. R. 378. Art. 13. Con.

If there be inherent defects in the levy, or the land is too high valued, the creditor may waive the levy or extent any time *before* acceptance of the land, but not after he has received seisin from the officer. The extent accepted is a statute purchase by the creditor, of the debtor's estate levied on. If the officer's return had no date, it is presumed to refer to the date of the appraisement, decided in debt on a judgment, and in a case stated. The creditor accepted livery of seisin in full satisfaction of his execution. Held, he was bound, and could not sue the judgment though the levy was never returned or recorded, and though the debtor immediately on the livery, reentered and occupied, and then sold the land: Gorham *v.* Blazo, 2 Greenl. 232–239; several Massachusetts cases cited.

To debt on judgment, the deft. pleaded in bar. that an execution issued thereon, which was extended on land of the debtor, and duly returned. Held, the plea was bad, on demurrer, because the deft. did not allege, also, that the execution was recorded in the registery of deeds before it was returned, with the return thereon: depends on special statute provision. The land did not pass to the creditor, and his debt remained unsatisfied, said the court, though it appears he accepted seisin; and ch. 42, a. 2, s. 30. 1 N. H. Rep. 371—373.

§ 19 *con.* Goods sold on this act of March 17, 1784, on execution must be completely sold in the four days after seized; therefore, where the officer attached for A, and then for B, and on A's execution sold on six months' credit, retaining the goods as security. Held, the sale was void, so the officer's note to A for the amount, and B's attachment held the goods, &c. Art. 14. Con. 2 Pick. R. 586—592, Bayley, admr. *v.* French; Prouty *v.* French.

Tools of one's trade are those convenient to carry on his business for himself and apprentices in the usual manner, though they carry on two trades. 2 Pick. R. 80–85.

§ 30 *con.* In New Hampshire, it has been decided that an attorney, if a 'reputable freeholder,' is a competent appraiser of land to satisfy a judgment in an action which he has conducted. The statute of the State, stat. 103, only requires an appraiser to be a 'reputable freeholder, and resident in the county.' The most interested persons in the county may answer this description. In Atherton *v.* Jones, pp. 363–364, held, 1. That the creditor in the execution being a justice of the peace, may swear the appraisers: 2. That the officer's return may omit to state that the above oath was administered, if the fact appear from the certificate of the justice on the back of the execution: 3. If several separate pieces of land be levied on, they may all be appraised in one sum.

Porter & al. *v.* Bean, 1 N. H. Rep. 362–367.

§ 32. Held, 1. The guardian, (was of a spendthrift,) may appoint one of the appraisers, and receive seisin in behalf of his ward; 2. It is enough the appraisers view the land, though they do not go upon it: 3. If several pieces of land be levied on, the debtor cannot redeem one without redeeming all: 4. It is not necessary to make a several appraisement of each.

2 Pick. R. 382, Bond, by his guardian *v.* Bond.

But, 2 N. H. Rep. 9, a store situated on the land of a third person, may be set off on execution, and, p. 148, if an execution be extended on a greater interest in land than the debtor owned, all he did own will pass by the extent.

Coos Bank *v.* Brooks.

An elegit of the whole is void. 2 Barn. and Cres. 232.

After a *fi. fa.* has been levied, the plt. cannot withdraw it, and issue a *ca. sa.* 3 Cowen, 30. 2 Pick. 331, confirms art. 14, s. 31.

§ 36. An officer returned on an execution, against a tenant in common, that he had delivered seisin of 'five acres and one-hundred rods of land on an average value, lying in common and undivided with A B in a farm, &c. containing one hundred and twentytwo acres, and an equal proportion of the buildings thereon standing; said farm bounded,' &c. This extent was supported, the portion set off is certain enough. If the appraiser be interested in the debtor's favour, he cannot object: 3. If the several executions mention more acres, than there are, they are valid, and the last creditor must take the residue.

2 Pick. R. 443, Cutting & ux, *v.* Rockwood.

§ 37. And execution levied on land must be returned into the clerk's office to complete the creditor's title; but if returned before offered in evidence of such title, it is sufficient, though after the return day. No time is fixed in the statute, 1783, c. 57, s. 2, by a fair construction of it.

3 Pick. 331–332, Prescott *v.* Pettee.

The word *indifferent*, as applied to the appraisers, means the same as the word *disinterested*.

4 Pick. 243.

§ 38. *The effect of levies.* When an execution is extended on land, it binds, unless defective on the face of it or fraudulent. But an action lies against the sheriff for a false return injurious to either party. The levy, &c. is valid only to the amount of the debtor's interest. Hence, if on more land, or on a greater interest than he has, so fails for the surplus, a new execution can be had by a *scire facias* for the deficiency. So if the goods levied on were not the debtor's property, all the proceedings on an execution, till the return day, relate back to the commencement of the proceedings. The levy is good, though the personal property seized be sold after the lapse of four days from the seizure, if no rights of third persons intervene. The levy holds though the debtor's land be appraised too low by mistake. His only remedy is to redeem it. And *assumpsit* does not lie to recover the amount of the mistake. To make the levy binding, all material facts must be stated in the return; therefore, if appraisers certify they set off the land in full satisfaction of the execution, with officer's fees and incidental charges, and do not state, in any other way, at what sum the land is appraised, no right passes by the levy, but it is void. An execution recovered against an administrator may be levied on land of the intestate.

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2 N. H. Rep. 137—315.

p. 137.

p. 145.

p. 301.

p. 495.

Mead & al. v. Harvey, 341.

§ 39. *Redemption of estates taken on execution.* See s. 14, a. 14; and 1 Cowen 443–460. In New York, the debtor has a year to redeem, and during the year the right is confined to him and his grantee. After the year the creditors of the debtor have three months to redeem. *Mandamus* issued to the sheriff to give a deed to a certain purchaser. The creditor must have a lie by decree or judgment obtained at any time within the fifteen months, and during the three months the redemption is confined to such creditors by decree or judgment.

1 Cowen, 501–513, Van Rensselaer *v.* The Sheriff of Albany County. *Mandamus* issued on the same principle as in the next preceding case. 4 Cowen, 133–137, rights of several to redeem.

§ 40. *Judgment creditor's right to redeem in New York, on act of April* 12, 1820. He has no right to redeem under the third section of the said act, except his judgment is a *lien* on the land he seeks to redeem: 2. It cannot be a lien on the land where it has been sold and conveyed by the debtor or the sheriff before the creditor's judgment is docketed, who claims to redeem: 3. Though it be urged the sale was fraudulent and void as to creditors, the court will not try the question on motion, where there is no lien, there is no right to redeem. Erwin *v.* Schriver, 19 Johns. 379; Dickerson *v.* Gilliland, 1 Cowen, 481.

Hurd *v.* Mason, Sheriff, 3 Cowen, 35–39.

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§ 41. Land passed by the general assignment under the insolvent act; and a creditor, whose judgment against the insolvent is perfected *after* the assignment, has no lien. Hence cannot redeem within the act of April 12, 1820. 3 Cowen, 69, 70.

4 Cowen, 417–418.

§ 42. Levy on personal property, sufficient to satisfy the *fi. fa.* extinguishes the judgment on which it issued; hence the judgment ceases to be a lien on the real estate, and the judgment creditor has no right, as such, to redeem under the act. Sess. 43, ch. 184, s. 31.

§ 43. Board's Case, 4 Cowen, 420–422. One who comes to redeem from a judgment creditor under the act, sess. 43, ch. 184, s. 3, may pay the money either to the sheriff or the creditor: 2. The sheriff may receive current bank bills even against the express direction of the creditor: 3. He may allow an assignee to redeem *de bene esse*, without demanding present evidence of the assignment.

Jackson ex dem. Stewart v. Lydia Town, 4 Cowen, 599–607.

§ 44. Judgment must attach *on some estate of the debtor*, or the sheriff's sale on execution is void. Case. Ejectment for 60 acres of land in Otsego county. The plt. proved Eleanor Town, mother of the deft., had possessed the land, claiming it as her own, and exercising acts of *ownership* over it; but November 1, 1820, moved from it and never returned. The deft. moved on April or May, 1824; that one Darby recovered judgment in slander, against said E. Town, (words spoken in May 1822,) at February Term, 1823, then docketed for $90; that execution issued thereon, under which, said land was sold to the plt's. lessor, Darby's attorney. May 7, 1823, the sheriff gave the usual certificate to the purchaser, and August 9, 1824, a deed of conveyance, acknowledged and recorded.

The deft. then gave in evidence a deed of the land from said E. Town to the deft., dated March 30, 1821, (not recorded) for a money consideration, part paid. No evidence the lessor, when he purchased at the sheriff's sale, knew of this deed. The plt. contended that as Otsego county was a recording one, said deed to the deft. was void *quoad* said sale. 13 John. 471; 4 id. 222. The deft. contended the plt. proved no estate, or seisin, legal or equitable, in E. Town, the judgment debtor; so no estate to which Darby's judgment could attach, or on which it could be a lien, so the sale was void; so the court decided; and this decided the cause; judgment for the deft. This seems to have been the only point argued by the counsel; though Mr C. states some ten or a dozen points as decided.

Curia per Woodworth. Observed E. Town possessed a

farm, claimed it, &c. and moved, &c. as above; that it did not appear who succeeded her; that these facts constituted a good *adverse* possession while she occupied, and no longer. And in law the possession was in him who had title; that there was no evidence of title in E. Town, nor how long her adverse possession continued. To avail, at all, it must have been for *at least* 20 *years*. 'That not being pretended, the fact is not established, that she ever had any right or title to the premises;' that it is clear the plt., in such case, when the deft. in the judgment and execution is not in possession, is bound to prove, on the trial, that such deft. had some right, title, or interest, in the premises sold. Stated the statute 1 R. L. 500, declaring 'that lands, tenements, and real estate, may be sold, and the judgment shall be a *lien* on the same;' that this makes every species of real estate liable to sale; that 'when a statute speaks of seisin, an equitable, may be as well intended as a legal one.' Caines' Cases in error, 66. It is evident, then, a seisin must be shown upon which the judgment attached, in order to recover the possession, when the deft. in the execution, is in possession, it is of itself sufficient, for actual possession is *prima facia* evidence of legal title. (2 Bl. Com. 196) 'He cannot show title in another.'

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Heir's share, how it may be attached immediately on the death of his ancestor. See ch. 125, a. 4, s. 2.

§ 45. B has a lease of my furniture for a year, his property therein is liable to attachment, and to be sold on execution; and as during the year, I have not the right of possession, I cannot replevin the same. See Gordon *v.* Harper, ch. 77, a. 5, s. 1. Same principle 2 Cowen, 543–548, and adds, if the sheriff sell the goods as the tenant's absolute property, not naming his special property, though he know of it, no action lies against him for this, at the lessor's suit, for it does not divest his right or impair his reversionary interest: 2. but it seems an action lies if he destroy or injure the goods: 3. The sheriff cannot seize and sell the property of A, on an execution against B.

3 Pick. 288.

§ 15. If A agree with B to burn a kiln of bricks, and therefor A is to have 10,000 of them when burnt, and he performs his contract, A has no vested interest attachable, till the bricks be actually or constructively delivered to him; and trespass lies against the officer who attaches them.

Art. 16. *Con.* 3 Greenl. 44–48.

§ 16. Sheriff—trespass against him for the act of his deputy, in attaching a stage coach about the time fixed for its departure, when part of the horses were fastened to it, and the passengers were engaged and ready to take their seats. Held, the attachment was valid. So of one driven into the yard

3 Pick. 368–374. Potter *v.* Hall.

where it used to put up, but before all of the passengers were distributed.

3 Pick. 484–492, Eaton *v.* Whiting. The mortgagor's interest in the lands mortgaged, is not attachable before he enters, if before he has foreclosed.

A tanner's property in his vats, where liable on execution against him, though he has given a bill of sale of it, as if he remain in possession. As where A, to secure B and C, two creditors, gave them a mortgage of his bark and tools in his tanyard, of his skins and leather unfinished in bark and vats, for tanning, provided he continued in possession, for the purpose of working, tanning, and finishing the same; and the mortgage was not recorded, and the property remained in possession of A, who was a tanner by trade, and he continued to work the leather in tanning, and to use for that purpose, the tools and bark, and no symbolical delivery took place, nor was there any schedule, inventory, or appraisment, of the property mortgaged. Held, this mortgage was fraudulent *per se*, and void against a *bona fide* creditor, without notice, who levied an execution six months after the date of the mortgage. Clow *v.* Woods, 5 Serg. & R. 275; see 4 Serg. & R. 117, Wager *v.* Miller.

1 Nott & Mc Cord, 171-173.

§ 33. *South Carolina.* See Lien, ch. 44, a. 8, s. 8. The execution binds from the delivery of it to the sheriff.

When the time of issuing a writ is material to answer a plea, it must be pleaded specially; and it is necessary to state the time of issuing the first writ, also the returns and continuances must be stated; and a return must purport something that can be understood without evidence *aliunde*.

1 Nott & Mc Cord, 125-127.

§ 34. The sheriff's return is good, though it does not appear on the execution that it was sworn to. Return in these words '*elongata* as to the goods and *nulla bona* as to costs,'—without any signature. Held good, though informal, for the words *elongata* and *nulla bona*, have a technical meaning and convey distinctly the meaning of the sheriff, that the goods were *eloigned*, and that he could not find any property to satisfy the costs, and the execution coming from the proper office is evidence he returned it, and the court presumes he has sworn to it. The statute does not require the oath be entered on the execution.

2 Nott & Mc Cord, 347.

p. 341.

§ 35. A *vested remainder* on a life estate may be levied on and sold, though the tenant for life be in possession. Where the sheriff has collected monies on an execution for the plt., the court can order it to be paid over to satisfy an execution *against* the plt. in the sheriff's hands.

2 Bay. 67. 1 Bay. 482.— 2 Bay. 68-120.

In the sheriff's sales, when the property is claimed by a third person, the sheriff ought to return the money into court, there to remain till the right is settled, and then make his return on the execution according to the result.

§ 36. *The sheriff's deed in New York.* Act April 12, 1820, allows the debtor a year to redeem the land sold on execution. In this case the officer's deed does not retrospect, and must be dated after the year is expired. The sale, in such case, is conditional only, and the purchaser has merely a lien on the land. Bissell *v.* Payn, 2 Johns. R. 3. See 16 Mass. R. 63, 66. Vol. V. Ch. 136. *Art.* 16. *Con.*

§ 37. The sheriff, on an execution, sold the house and lot of the deft., and executed a deed to A, and afterwards seized and sold the same to B, on another execution, issued on a prior judgment, against the same deft., and advertised the same for sale. The court left A to his action at law. Myers *v.* Kelsey, 19 Johns. R. 197. On all executions the goods taken thereon must be taken from, or not left with, the debtor. 19 Johns. 197, 379; 11 Johns. R. 119; 15 do. 429; 17 do. 274, 332.

§ 38. Two different plts. obtain two several executions against A—both delivered to the sheriff, but at different times. He sells A's goods, and applies the proceeds to pay the last execution, leaving the other not satisfied. Though accountable to the plt. in the first for so misapplying the proceeds to the last execution, yet a third creditor, who got possession of the goods after the delivery of the first execution, but prior to the second, cannot avail himself of such act of the sheriff, or question the sale. Beals *v.* Allen, 18 Johns. R. 363. On the same principle, the sale on the second execution is valid against the plt. in the first, and for the wrong to him he has his remedy against the sheriff only. 12 Johns. R. 162. Where the court will direct a preference among execution creditors. 18 Johns. R. 505, Auburn Bank *v.* Throop.

§ 39. *North Carolina.* An equity of redemption cannot be sold on an execution at law. 1 Murph. 333.

§ 40. An execution *bearing the first teste* is satisfied before one of a later teste *first* delivered and levied on property, but not sold, before that of the first *teste* comes to the sheriff's hands. A sheriff levies on certain lands, and a *venditione*, with a special *fi. fa.* issued afterwards on the same judgment, and was levied on goods, which, some days prior to that time, he had seized on a *fi. fa.*, issuing on a younger judgment, the court ordered the proceeds of the sale to be paid to satisfy the *fi. fa.* which came first to his hands, and was first levied. Green *v.* Johnson, 2 Hawks, 309. Ablemong *v.* Allinson, 1 Hawks, 325.

§ 41. Under the act of 1792 a sheriff's bill of sale for a slave is like the bill of sale made by any other person; and when the purchaser takes actual possession of the slave the conveyance must be recorded in the county where such purchaser resides. 1 Hawks, 307.

Vol. V. Ch. 136. *Art.* 16. *Con.*

§ 42. Monies were divided by the court between two creditors, A and C, on their executions against B. Afterwards it was discovered by C, that A's record was not filed, and C moved to have all the money, but the court allowed A to file his record *nunc pro tunc*. 3 Cowen, 39–57, Chichester and another *v.* Cande, impleaded with Lasher. Cande and Lasher were partners, and seven judgments were obtained against them, some as partners and some not. The executions were against *personal* estate bound by the executions alone, and not against *real* estate, bound by judgment. Several minor points omitted. The material one was that decided above, mainly on the particular circumstances of the case. In the eighteen pages this report and notes occupy are several other cases stated somewhat at large.

Doe *v.* Irwine, 2 Hawks, 232. An execution binds property in the hands of the deft. and all others claiming under him from the teste.

Lanier *v.* Stone, 1 Hawks, 329.

§ 43. A levy was made by a constable, under a magistrate's execution, on the deft's. land and returned the same day to the court, which commenced its session on that day. Held, this was a return to the *next court* within the meaning of the act of 1794, s. 19. 2. If a sheriff has levied an execution on chattels in due time, he may complete his levy by sale of them after the return day, though he cannot levy after that day: 3. Not necessary a *venditione*, issuing on a constable's levy, should be made returnable at any given time.

§ 44. *Kentucky.* It seems when property taken in execution is claimed by another, if the officer impannel a jury, and they disagree, this protects him, as does a verdict against the claimant. 2 Litt. 130. P. 131, but the officer executing an attachment, issued by a justice of the peace, has no right to impannel such a jury, on execution or order of sale, or at any time, hence a verdict in such a case is void, and no protection. 1 Litt. 268. A deputy sheriff cannot legally execute a *scire facias*, issued in his own name and for his own benefit. Wilson *v.* King, 3 Litt. 458. If all the defts. in an execution do not replevy it, those who do not replevy, cannot sustain a motion to quash the replevin bond.

2 Litt.

§ 45. *Replevin.* As a replevin bond takes effect from the *delivery*, it may be valid, though there be a blank in it when sealed. An action lies not to recover back the money collected on an illegal replevin bond, unless it has been set aside, and a justice of the peace has the same power to quash such a bond, taken in a case before him, as the court have. And 1 Litt. 295, a motion to quash a replevin bond cannot be made in the name of the surety only, the principal must join.

Thomas *v.* Clarke, 1 Litt. 288-289.

§ 46. If in an execution the plt. induces others not to bid for the land, by promising to purchase it himself, and to sell it to them at a low price, and such parts as they may want, the sale must be set aside. On a sale on an execution a bond is given, on a motion to quash the bond, the exception is *quasi* plea of *non est factum*, as denying the power of the attorney who executed it; and where it purports to have been executed by an attorney, an affidavit is necessary denying the execution of the bond.

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1 Litt. 317. Mills v. Rogers, 1 Litt. 19.

§ 47. When the sheriff sells real estate on an execution, he cannot legally deliver possession to the purchaser, without the owner's consent.

Sheriff's return on an execution, that he had sold the property on credit, and taken a bond for payment of the purchase money, the quashing this return does not *of itself* set aside the sale, or quash the bond. 2 Litt. 117. 3 do. 129: so his return, he has sold, &c. and taken a *statutory* bond, conclusively proves the sale, the execution of the bond, and who were the purchasers and sureties, unless falsified by judicial sentence in a proceeding to which the sheriff was a party. 3 Litt. 467. His return to a writ of *habere facias possessionem*, that he had delivered possession to the plt. is only *prima facie* evidence in controversies with strangers. Gray *v.* Gray. 1 Litt. 19. A bond is not to be quashed because given for too much, but the excess ought to be credited.

§ 48. *Tennessee.* 1 Tenn. R. 101. The sheriff in execution may sell the land of the deft., though in the possession of another person claiming in opposition to the debtor's title. Trust estate may be taken in execution for the debts of *cestui que trust*. 3 Hayw. 1. So a still set on the premises by the lessee may be taken on a *fi. fa.* for his debts. 5 Hayw. 109. On the return of a *distringas* issued on a judgment in detinue, the property not having been delivered, a *fi. fa.* will be awarded. Sheriff's vendee is not affected by irregularities of the judgment if it appears the court had jurisdiction, and that the deft. had notice, actual or constructive. 5 Hayw. 154; 1 Tenn. Rep. 209–274. The purchaser is required to see only to the judgment and execution. 2 Litt. 44, 272.

§ 49. Executions. Action against the deft., as sheriff, for the alleged default of his deputy, in not seasonably returning an execution levied on land, and when the return day fell within the time allowed by law for recording the levy, &c. Held, 1. If the officer do not cause the levy to be recorded, or return the execution into the clerk's office on or before the return day, or deliver it to the creditor in season to be recorded, he will be liable to the creditor for the value of the land lost by his neglect: 2. The title of a creditor who attaches

5 Pick. 171-175, Mc Gregor & al. *v.* Brown.

Vol. V. Ch. 136. Art. 16. Con.

and levies on land, but neglects to get his execution recorded in the registry of deeds, until after the three months from the levy, is invalid against a creditor who obtains a title to the same land, by attachment and levy, or by deed, between the first creditor's attachment and recording his execution. Many cases cited by the court.

§ 50. Where land is not liable to be levied on. Entry *sur disseisin*. Held, an executor who is residuary devisee, by giving bond in the probate office to pay debts and legacies acquires an absolute title in the estate of the testator devised, so that it is not liable to be taken on execution, though he do not give notice of his appointment, &c. and taking upon him the trust.

5 Pick. 337–347, Clarke v. Tufts.

Art. 17. Con.

§ 8 *con.* A, the creditor, commits B, his debtor, on execution. A sues a trustee action against B's effects, in C's hands, and releases B's body on statute 1788, c. 16, s. 4, Maine act ch. 16, sect. 16. C is discharged having no effects of B, A may have judgment in the trustee suit against B, and again take him in execution; 'the release of the body is no discharge of the debt.' On said statutes, special provision. See Dunning *v.* Owen and trustee, ch. 146, a. 8, s. 15; Clark *v.* Goodwin, ch. 146, a. 8, s. 16.

1 Greenl. 158–166.

Cutts v. King.

Armstrong v. Garrow, sheriff of ——, 6 Cowen, 465–471.

§ 29. The sheriff has my execution against A, takes his note, returns it satisfied and discharges him. I may treat the case as an escape, or sue the sheriff for money had and received, and interest from the return day, and when he has paid me, his note from A is valid. Such return is evidence the sheriff has received the money before the return day, though the *ca. fa.* be not in fact returned until after that day. Such note is void taken without my consent, but good if I ratify the transaction, as above. If I direct the officer to proceed in a course not required by law, he becomes my agent, and if a deputy, the sheriff is not liable for his conduct. Cases cited, 7 John. 159, 319; 8 id. 98; 2 Bos. & P. 151; 1 Cowen, 46; 4 id. 553; 15 Mass. R. 534; 11 John. 468–518, &c.

Art. 19. Con.

§ 1 *con.* 2 Pick. R. 508–512, Russell *v.* Lewis. A trust estate cannot be levied on by a creditor of the *cestui que trust*

16 Mass. R. 400.

§ 10. Entry *sur disseisin*. Held, lands mortgaged by a judgment debtor may be appraised on execution, as if not mortgaged; and the judgment creditor has his bill in equity to redeem.

16 Mass. R. 402—406, Denny, a deputy sheriff, v. Hamilton, also a dep. sheriff.

Special declaration, and adjudged, the deft. who on the Statute of 1804, ch. 83, s. 6, had sold an equity of redemption on execution, was bound to pay over to the plt. the surplus money arising from the sale, having an execution against the same debtor. It seems it was the plt's. own debt, and his debtor was insolvent, and the deft. paid the surplus to some who attached after the plt. did, by a coroner.

If an execution be attested by fraudulently inserting a direction to a constable, payment to him does not discharge the debt. The alteration may be proved by parol evidence. An attorney has no power to discharge a debtor, on his paying a part of the debt due on it; and if he obtain it by fraudulent concealment of property, his discharge is void. Case against a constable for not seizing and selling a right to redeem real estate. Held, the officer is bound, on receiving the execution within thirty days after judgment, to sell it or goods attached, and not to wait for the creditor's instruction. *Secus* as to a levy on land, for in this case nothing can be done without the creditor's presence.

1 Pick. R. 362—368—347. 521—524.

§ 22. This bond may be good, though there be no place appointed for the delivery of the property. 1 Wash. 254. It must be made to the creditor, stating the amount of the execution conditioned to deliver the property 'at the time of the sale,' not when demanded. Downman *v.* Chinn, 2 Wash. 182. If taken for a sum too large, judgment may be for the sum. 1 Call, 47–49. If this bond be not good by statute, it may be by common law. 3 Call, 454.

To a motion as to such bond, *non est factum* is pleaded, the court may give judgment with or without a jury: 2. Though judgment be for more than is due on the execution, yet if that be not made a part of the record below, no objection lies in the court of appeals. A forthcoming bond makes no new contract; hence, interest must continue as in the original contract, though interest be raised from five to six per cent. as in June, 1796. A confession of a judgment on a motion on a *forthcoming* bond operates as a release of errors in the original judgment.

1 Rand. R. 1—2. p. 86. 1 Rand. 46—48. 3 Rand 160—165.

An executor confesses judgment, and gives *forthcoming bonds* for the testator's debts, thinking assets are sufficient, &c., but finds they are not so, owing to an unexpected depreciation of property; he shall be relieved in equity.

1 Rand. 138—148.

A, B, and C, give a forthcoming bond; C pays it and sues B as principal. It did not appear in the bond whether he was principal or surety. The superior court admitted evidence to prove B was principal and C surety, and gave judgment for C, and the supreme court of appeals affirmed judgment, believing the court below had evidence of the fact.

4 Rand. 189—192.

§ 24. The ten years judgment *lien*. Statute, April 3, 1821, is, that all judgments, hereafter to be rendered, shall cease to be a *lien*, or incumbrance, on the real estate, as against *bona fide* purchasers or subsequent incumbrancers, by mortgage, judgment or otherwise, from and after ten years from the time of docketing. Held, issuing the execution within the ten years, and a sale under it after, will not extend the lien of the judg-

Roe *v.* Swart; Ten Eyck *v.* same, 5 Cowen, 294.

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ment, as against subsequent judgment creditors, &c. But the lien ceases at the expiration of the ten years.

5 Cowen, 280.

§ 25. Where a sheriff sold property on an execution against A, and endorsed the amount of the sales on the execution, and afterwards B recovered the value in an action against the sheriff and the creditor, the court allowed the endorsement to be stricken out, and ordered that an *alias fi. fa.* should issue for the whole.

5 Cowen, 418 —419.

§ 26. The plt. in the execution in ejectment, was entitled to possession of three sixths on getting possession of the whole; the court ordered him to restore so much to the deft.

CHAPTER CXXXVII.

WRITS OF ERROR.

Art. 4. *Con.*

§ 6. Cases. 17 Mass. R. 49–52; 14 id. 394; 2 Pick. R. 597; these are further cases in which error does not lie, and 1 N. H. Rep. 338.

§ 21. Error does not lie on an arrest of Judgment; but where a verdict has been given for the plt. and judgment is arrested, he may move for judgment against himself, in order to bring a writ of error; and if the court refuse to give such judgment, he may apply to the Supreme Court for a *mandamus*. Horne *v.* Barney, 19 Johns. R. 247.

§ 22. A juror being challenged as being interested on the *voire dire*, swore he was not, but the triers found he was not indifferent, and he was set aside; the Common Pleas expressed no opinion. Held, no writ of error lay. Mechanics' Bank *v.* Smith, 19 Johns. R. 115; but Foot *v.* Sabin, do. 154, error lies when the deft. moves to nonsuit the plt. because his evidence totally fails, and the Common Pleas refuses the nonsuit.

Robison *v.* Scott, 3 Litt. 288.

§ 23. If an order of a circuit court, merely set aside a judgment and verdict and give judgment for costs, making no other disposition of the cause; this is no ground for error. 2 Litt. 147. Under the act of 1816, error does not lie after three years on a joint decree, though one of the plts. in error was a *feme covert* when the decree was made. Otherwise, under the act of 1796, p. 153.

§ 24. Colden *v.* Knickerbocker, 2 Cowen, 31–56. Court of errors. Held, 1. Error to the Supreme Court does not lie for the deft. below, on his default, (court not unanimous,) and when brought in such case is to be dismissed.

2. The plt. in error may allege diminution, stating what is omitted, and have a *certiorari* to have a transcript of all omitted.

3. When there is a count on a note, and the money counts, the clerk may assess the damages on the act of New York, 1 R. L. 522; and not on English authorities; and it seems he may assess damages, generally, on such counts, for one senator observed the note is evidence on the money counts, so he had a measure of damages whereby to assess damages on any of them. In such a case the judges in Massachusetts assess them, being empowered so to do, by a statute, &c. VOL. V. CH. 137. *Art.* 4. *Con.*

4. The Chancellor, and it seems eleven senators, a majority, held, if the deft. make no defence in the Supreme Court, but is defaulted, in which, on application, he can have redress, he has no writ of error; and that the jurisdiction of the court of errors is only 'to reexamine and *rejudge*, and to correct erroneous decisions *actually made*;' 'to affirm or reverse or alter determinations made by Judges;' bound by the constitution to give reasons for their decisions. Sudam and seven other senators, it seems, agreed in most of these principles, but did not agree in dismissing the writ of error; but Sudam thought a court may give judgment on default, and it is strictly a judgment on which error lies. He made three questions involving the above points; did not agree in the first, but did in the others.

§ 21. A writ of error lies from the Supreme Court of the United States, on a judgment of the Circuit Court, awarding a peremptory *mandamus*. 7 Wheat. 534. ART. 5. *Con.*

§ 22. An erroneous decree for land is made against one dead at the time, and though the suit is not revived, his heirs have error in their own names, and need not apply to the court below, to annul the decree; and 3 Litt. 1. Callaghan v Carr, 2 Litt. 154.

§ 23. Held, 1. An execution may issue as soon as a judgment is perfect, subject to be defeated by a writ of error filed in four *juridical* days thereafter: 2. A writ of error, returnable to the Supreme Court, must issue from it, and is a nullity, if issued from chancery: 3. A writ of error will not supersede an execution *executed*: 4. In such case the court may order the money to be brought into court, to abide the event of the writ; form of the *mandamus*; there was a rule to show cause, &c. Blunt v. Greenwood. 1 Cowen, 15–22.

§ 24. Error limited to five years, &c. Deft. moved for a rule to enter continuances from —— to ——; also to enter on file a *bill of exceptions*. Held, 1. The plt. cannot, by omitting to enter continuances, &c., lessen the defts'. right to bring error: 2. Where the judgment is rendered within five years in fact, but by omitting the continuances it appears of record to be above five years before. Error being brought, the court ordered the continuances entered *nunc pro tunc*. Manhattan Co. v. Osgood & al. 1 Cowen, 65–70.

Vol.. V. Ch. 137. Art. 5. Con.

as to avoid the act of limitations: 3. Where a bill of exceptions had been taken, but not entered on the roll, or filed, nor attached to the record, the court, after a delay of several years, ordered it, on motion, to be so filed and attached, in order to enable the deft. to bring error. Also, execution had issued, and sales and satisfaction made under it.

§ 25. 1 Cowen, 356–357. If the Common Pleas ought to nonsuit the plt., and refuses to do it, error lies.

Art. 6. Con.

§ 9 *con.* It is error in a court of law, to enter judgment against the deft. on the day after a conditional judgment has been confirmed at the rules; he having to the next term, &c. by statute, 1 Rand. 460; and 4 Rand. 192–194, when the judgment of a competent court is pronounced on any question, it is conclusive on all other tribunals until it is reversed by a regular course of proceedings. The judgment rendered was that of a Hustings court, appointing an administrator, with the will annexed. This judgment was not appealed from; the same person applied a second time. Judgment in this Hustings court against him; he appealed from this second judgment or decree, to the Superior Court; and then to the Supreme Court; and Held, the said first judgment not appealed from or on error reversed, concluded the party.

Art. 9. Con.

§ 6. After seisure of goods under a *fieri facias*, a writ of error is no *supersedeas*. 1 Har. & McH. 221–222. And though error be pending and writ of error bond be filed, the court may issue a writ of *venditioni exponas*, for the sale of the goods. 11 Wheat. 414, as to summons and severance.

§ 11. Dorris *v.* Callow, 2 Litt. 371. Where a writ of error *coram nobis* has been quashed for insufficiency of notice, the notice must be made a part of the record, by a bill of exceptions.

M'Coy *v.* Hill, 2 Litt. 377.

§ 12. Where error is assigned in overruling a motion in arrest of judgment, the grounds assigned for the motion, must appear in the transcript of the record of the court below, otherwise, the court of Appeals cannot take notice of it.

Governor *v.* Bacon, 1 Litt. 284.

§ 13. On a plea of *nul tiel record* to an action on a *supersedeas* bond in a writ of error *coram nobis*, where it appears that a summons issued, that both parties appeared, that a trial was had, and the plt. in error prevailed in the inferior court, the record is complete without the writ of error.

Goldsbury *v.* May, 1 Litt. 255.

§ 14. The court of appeals cannot notice the instructions to a jury, unless by bill of exceptions made a part of the record, or otherwise, though copied by the clerk with the record.

Irishin, adm'r. *v.* M'Laughten, 4 Cowen, 583–596.

§ 15. Error to the Common Pleas. Held, the plt. may assign common errors, and allege diminution at the same time, and take out a *certiorari*, and enter his rule to join in error:

2. And if the deft. do not join in error according to the rule, the plt. may enter a default, though the *certiorari* be not returned. VOL. V. CH. 137. *Art.* 10. *Con.*

§ 6. In replevin, in the county court, the clerk omitted to enter *the return awarded*, on error, brought in the General Court, it ordered a writ of *diminution* to the county court, on the ground it had authority to correct its judgment, at any time when informally entered by the clerk. 4 Har. & McH. 163–165, Duval *v.* Wells. See Amendments, ch. 184, a. 6.

§ 23 *con.* Costs in New York. Raymond *v.* Merchant, 4 Cowen, 129–132. The statute concerning writs of errors, 1 R. L. 143, s. 2, requiring the plt. in error to give bail for the debt or damages and costs, extends to a judgment for the deft. for costs only. 3 Cowen, 147, same case. Was a new question on the construction of the act. ART. 15. *Con.*

Some late cases of error in Pennsylvania, of general use. It may be observed that writs of error in this State, are regulated in a considerable degree by several statutes. February 24, 1806; March 11, 1809; March 20, 1810. ART. 17. *Con.*

§ 1. A party has a right to ask the court's opinion on a point of law, touching the issue, and to refuse to give it, is error. 1 Serg. & R. 449; 4 do. 298.

§ 2. There must be nothing in the charge of the judge that may lead the jury to infer that they are not to consider the facts, and weigh the evidence. 4 Serg. & R. 442.

§ 3. It is not ground of error if the court err in their charge on a matter immaterial, and not pertinent to the issue. 4 Serg. & R. 498. Nor is the court bound to answer any question not pertinent to the issue, nor any question not fairly arising out of the evidence. 3 Serg. & R. 283.

§ 4. Though the judge gives a decided opinion on the facts, yet, if given merely as *opinion*, and not as a direction binding on the judgment of the jury, it is not error. 4 Serg. & R. 442.

§ 5. If the evidence be written and parol, the deft's. counsel has no right to ask the opinion of the judge, if, on the whole, the plt. has maintained his action. 1 Serg. & R. 176. Nor is it error if the judge leave the whole case to the jury when mixed up of law and fact, unless the counsel select some particular point for his opinion. 2 Serg. & R. 464. Nor is the court bound to answer and state what the law is on all the evidence. Its opinion is to be asked only on specific facts, granted or supposed. 1 Serg. & R. 515.

§ 6. Error lies not for the court's misstating an *abstract principle*, not relating to the cause, or arising out of the evidence. 3 Serg. & R. 344. If the jury understand the judge,

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error does not lie on account of his language, to which critical objections may be made. 4 Serg. & R. 211.

§ 7. If the court be asked to answer an abstract question in the case before the jury, it may take a view of the general principles of law relating to the question, and observe thereupon, as it may deem proper. 4 Serg. & R. 471.

§ 8. If the plt. bring error, the court above may give the right judgment. If the deft. bring error, it can only reverse. 4 Serg. & R. 396 : may reverse in part, and affirm in part : id. Otherwise in a criminal case. 4 Serg. & R. 451.

CHAPTER CXXXVIII.

CERTIORARI.

Art. 1. Con.

§ 14. New York. The Supreme Court has a general superintending power to award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power over the rights and property of others, for the purposes of supervising their proceedings, even in cases in which they are authorized finally to hear and decide, &c. Le Roy *v.* Corporation of New York, 20 Johns. R. 430. It is reasonable to understand that every Supreme Court in the United States has such power to issue this writ of *certiorari*.

§ 15. A *certiorari* is granted by the Supreme Court on facts not contested, apparent on the records or papers before the court; but a rule is proper when an application is made on facts not so apparent. In all cases, when the *certiorari* is returned, the facts may be controverted. Cherry *v.* Slade, 2 Hawks, 400. Many other cases of *certiorari* in North Carolina, as 1 Hayw. 17–28–302–367–420; 2 Hayw. 245; 1 Taylor, 15 : 1 Car. Law Rep. 379; 2 do. 70–636; 1 Murph. 184–438; 2 do. 252. This writ, as well as that of error, is much used in North Carolina, as well as in Tennessee, as in the numerous reports in those States : all on the common principles, common to twentythree States, but with many minor variations introduced by State statutes. See 1 and 2 Tenn. Rep. and Hayw. R. of Tennessee.

Art. 2. Con. 1 Cowen, 59–60.

§ 8. On a *certiorari* to a Justice's court, he must return, as to all the facts stated in the *affidavit* on which it is founded, that they are true or not true, *according to the best of his recollection and belief*. Nor is he excused on his *affidavit* that he has no minutes and remembers nothing by which he can make such a return. So is he required to do by the act (sess. 36, ch. 53, s. 20, 1 R. L. 397.) A return to a *certiorari* will be set aside if it be drawn by the attorney for the plt. in error,

but not if dictated by the justice, and so certified. 3 Cowen, 20; same 4 Cowen, 505, Philip *v.* Caswell, 537. *Secus*, deft's. attorney.

§ 9. Only certiorari, and not error, lies to the orphan's court from the general court. 3 Har. & McH. 348.

Certiorari lies to the court of Common Pleas in criminal prosecutions carried there by appeal from a justice of the peace. Certiorari lies not to remove into the Supreme Court, proceedings commenced before a judge of the Common Pleas, under the act of April 13, 1820, to amend the act concerning distresses, &c. until the case has been finally tried and judgment given before the judge of the Common Pleas. Nor will a writ of *certiorari*, though issued after judgment, stay the writ of restitution in such case.

4 Pick. 125—126. Lynde *v.* Noble, 20 Johns. R. 80.

§ 10. The plt. in error must procure a return to a *certiorari* or be nonsuited. And a return must contain in itself a complete history of the case, and not by reference to affidavit on which it is founded.

3 Cowen, 58.

§ 11. On *certiorari* to a justice's court in a suit under the act sess. 47, ch. 228, for the more speedy recovery of debts, to the value of $50, the deft. omitted to plead, so *no issue could be joined and tried*; hence no appeal to the Common Pleas. Therefore on the last, *certiorari* issued on judgment against the deft. &c. id. 536.

Harwood *v.* French, 4 Cowen, 501—503.

§ 12. Cause must be shown for a *certiorari* in all cases where it is to review the proceedings of an inferior jurisdiction for error, except the people sue out the writ. 'If it were otherwise, we might have every petty judicial controversy in the State before us.'

Munro *v.* Baker & al. 6 Cowen, 396—397.

§ 12. Matter *dehors* the record. It seems in order to warrant the issuing of this writ, on error, to bring up any proceedings *dehors* the record, the plt. in error must first assign the diminution specially, and serve it on the deft., or his attorney, as in common cases of an assigument of errors. The court may award a *certiorari* in support of a judgment at any time.

ART. 4. *Con.*

§ 6. This was a writ of *certiorari* on the *militia* act to remove proceedings commenced before a justice of the peace on the complaint of the clerk of a company of militia. Held, when a volunteer company is enlisted within certain limits, a private in it, who removes out of those limits, is not held afterwards to do duty in it; but he may be enrolled in the regular militia company within whose limits he dwells: 2. The warning to a soldier in the militia to appear at a muster, being left at his workshop, is not sufficient notice: 3. A volunteer company must be raised within the brigade, &c.: hence, 4.

ART. 7. *Con.*

16 Mass. R. 194–198, Commonwealth *v.* Cummings.

Vol. V. Ch. 138. Art. 6. Con.

When one of such company moves permanently out of those limits, (as in this case,) he ceases to belong to it: 5. *The usual place of abode* is *the dwelling house.*

16 Mass. R. 523, 524.

§ 7. *Certiorari* on the *militia* act to remove, &c. as sec. 6. Held, the power of the governor and council to make new divisions of militia companies, and the effects of orders, making such divisions, are as settled in the case of the Commonwealth *v.* Thaxter, 11 Mass. R. 386.

17 Mass. R. 351, Lees v. Child.

§ 8. Petition for a writ of *certiorari* to a justice, &c. to certify, &c. the proceedings on the complaint of Child, clerk, &c. on which Lees, *a quaker*, had been fined. As a copy of the proceedings accompanied the petition, the cause was heard on the merits, as on the return of a *certiorari*. Held, to exempt Lees, he should have produced a certificate to the commanding officer of the company, &c. *before* the first Tuesday of May, preceding his being warned to attend the muster of the company: 2. The *committee must* aver in their certificate they believe the party conscientiously scrupulous of bearing arms.

1 Pick. R. 194-196.

§ 9. *Certiorari*, as sec. 6, &c. Held, a person having a *temporary* residence, for a special purpose, at a place where he is not domiciled, is not liable to be there enrolled in the militia. The deft's. domicil was at New York: he and his family, as visitors, spent most of the summer and part of the fall at his father's in Medford.

§ 10. 1 Pick. R. 241-262, *Ex parte* Hall, held, by an extraordinary promotion in the militia, no officer is *superseded* except the one, who in the ordinary course of promotion, would have succeeded to the vacant office, and it seems he only has a right to resign.

1 Pick. R. 463, 464, *Ex parte* Gallop.

§ 11. Petition for a writ of *certiorari* to a justice, &c. who had fined Gallop for neglect to appear, &c. Held, under the statute of 1809, c. 108, a brigadier general may discharge a private from a *volunteer* company on the application of the captain of *a standing* company; and if the private do duty in the standing company, he will not be liable to a fine for non appearance in the volunteer company, though his discharge should not be duly notified to the captain of such company.

CHAPTER CXXXIX.

DEBT; GENERALLY.

Art. 1. Con.

§ 2 *con.* See ch. 29, a. 16, s. 1; Barry *v.* Robinson, New R. 293; 8 Wheat. 672, &c. there cited; ch. 29, a. 16, s. 1.

Debt lies on a promissory note against executors, the wager of law, if it ever had legal existence in the United States, is now completely abolished; debt against an executor is in the *detinet* only, unless he has made himself personally liable, as by a *devastavit*. 8 Wheat. 642–675. VOL. V. CH. 139. *Art.* 1. *Con.*

§ 6. Debt lies on no *conditional* or collateral undertaking. A indorses a writ and the principal avoids the remedy under the statute 1784, ch. 28, (statute 1821, ch. 59, s. 8,) is by *scire facias*, and not by action of debt. The endorser's undertaking is in its nature *conditional*. It is also a *collateral* undertaking by one man for the *conditional* payment of the debt of another. 2 Greenl. 128–130, Reid *v.* Blaney.

§ 1 *con.* No variance to state the words of a contract, &c. as Barn. & Cres. 358–368, a declaration stated that by a certain indenture, it is witnessed, &c. and stated the words of the deed. Held, there was no variance. The legal effect of the whole deed may be different from that which the part stated imports: 2. Where the deft. sets out on oyer a deed on which the declaration is framed, he cannot, on demurrer, take advantage of a variance, in an immaterial part, between the deed stated in the declaration, and as set out on oyer. ART. 2. *Con.*

§ 9 *con.* 2 Pick. R. 512—517, Barrett *v.* Pritchard. *Conditional sale with delivery.* Trover for a quantity of wool. Plt. owned it, and delivered it to the deft., to be manufactured, who gave his receipt, saying he received it to manufacture, &c. at 75 cents a pound, &c. 'which amount I agree to pay in six months: the wool, before manufactured, after being manufactured, or in any stage of manufacturing, to be the property of the plt. until the above amount be paid.' Held, the property remained the plt's. until the payment both against the deft. and his creditors. Cited 4 Mass. R. 405; 17 do. 606. No fraud on them, as delivery in such a case was not evidence of property in the deft., and if they saw the receipt they saw the condition. See chapters as to Frauds; 14 Johns. R. 167; 15 do. 147—349; 16 do. 225. ART. 8. *Con.*

A has goods in his store and sells them to B, on credit, takes his note payable in six months on interest. The goods being sold by marks and numbers; and it is a part of the bargain they may remain in A's store, rent free, at B's option and for his benefit, until A shall want the store room. Here is a complete sale and delivery; and if B become insolvent, A cannot retain the goods, but B's trustee may recover in trover against A, he having sold them to C. 1 Mason, 107–116, Barrett *v.* Goddard.

3 Mason, 478, Buffum *v.* Merry. Trover for two thousand nine hundred pounds of cotton yarn and seven thousand yards of cotton cloth. Plea, not guilty. Facts:

Vol. V Ch. 139. *Art.* 8. *Con.*

the plt. owned the yarn, and offered to sell it to one Hutchinson. He failed, and his property was assigned to the deft. He declined buying, but offered to take the yarn at 65 cents a pound, and to pay the plt. the amount in plaids, at 15 cents a yard; also offered, as nearly as he could, to use the plt's. yarn in making the warp of the plaids, and to use for filling other yarn of as good quality. The bargain was closed accordingly, and the yarn delivered to H., before he failed, when he failed it was not manufactured into cloth, but with his other property was assigned and delivered to the deft. for the benefit of H's. creditors. Held, here was a sale, and the property passed to Hutchinson. See Accession, ch. 76, a. 1, and 19 John. R. 44; rather doubted by Judge Story. See Warranty of Goods, ch. 62.

Where the sale has been completed and the property changed, or not, is a question for the jury. 13 Johns. R. 294.

Norton v. Squire, 16 Johns. R. 225. —2 Const. Rep. 770.

If a creditor receive from the debtor property to pay the debt, and possesses and uses it, and has a reasonable time to sell it and does not sell it, or take the usual steps to do so, he is deemed a purchaser.

A, having furniture and plate, became insolvent, and B, a widow, and his wife's mother, lent A her notes to a large amount, payable to a creditor of A, and he covenanted to pay them, and she, as the head of the family and conductor of it, being in possession of the furniture; A made a bill of sale of it and of the plate, and deemed valid.

19 Johns. 218.

Cowell v. Weston, 20 Johns. R. 414.

§ 16 *con.* Heirs being liable to the creditors of their ancestor in respect to lands descended to them, no alienation by them after the suit brought can protect them or their purchaser: but 2. When land is sold by license or order of the court of probate, or surrogate, on the application of an executor or administrator, for want of sufficient personal assets under the statute, (sess. 36, ch. 79, s. 23, 24, 25,) such sale being declared valid and effectual against the heirs and devisees, and all persons claiming by, from, or under them, is also valid and conclusive against a creditor who had brought his action against the heirs, and may be pleaded by them in bar of such action: 3. Such creditor, by bringing his action against the heirs, does not acquire a *lien* on the *land* descended to them, but his *lien* is merely on the heirs, in respect to the land descended, so that they cannot alien it after the action is brought and defeat his claim: 4. The heir of an intestate takes the land of his ancestor, subject to the right of the administrator, to apply to a court of probate, or surrogate, for the sale of it, in order to pay debts, and when the power given by the court of probate, or surrogate, for that purpose,

Id.

Id.

has been executed, the title of the heir is gone, and he has nothing by descent. So the heirs take the lands of their ancestor deceased intestate so subject in every state in the Union where his lands are liable to be sold for the payment of his debts by the license or order of some court, and it is understood that in every State in the Union lands may be so sold by some public authority.

CHAPTER CXL.

ANNUITIES.

§ 23 *con. Annuity in common*, &c. A bequest of annuity to the children of A, in equal shares and proportions, to continue during their joint lives, and the life of the survivor of them, they take in common. There is no survivorship among them by implication. Hence, when one dies its share goes to the representatives of it. 1 Jacob & W. 100.

§ 24. Where an agreement was made for the sale of an annuity to commence from the date of the agreement, and to continue for three lives, to be named by the grantee, the court decreed a specific performance thereof when the three lives had not been named, the *grantor* having occasioned the delay. 1 Jacob & W. 396-406, Pritchard v. Avery.

25. Covenant stating that by a certain indenture between the testator of the first part, Patience Petrie of the second, and the plt., one Beddome, and said John Bury of the third, which indenture, sealed by the testator, the plt. brought into court, and averred that Beddome and John Bury never sealed or delivered said indenture, reciting a marriage was intended between the testator and P. Petrie, in consideration thereof the testator covenanted with the plt., Beddome, and J. Bury, that in case the marriage took place, and said Patience survived him, his heirs, executors, or administrators, should pay to them, the plt., Beddome, and J. Bury, an annuity of £200 for the use of the said Patience. Marriage took place, she survived and still living, &c. and £250 of the annuity was in arrear. Deft. set out the deed on oyer, and demurred, and joinder. The court held, 1. That all joint covenantees, who may sue, *must* sue, and that the declaration was bad, as it did not appear that any of the covenantees had not assented to the deed, though they did not seal it: 2. It seems as the covenant was made with three persons, though two did not seal, yet in law it is not converted into a covenant with one. Holroyd, J. said, 'there are many cases which show that all joint covenantors may sue although they have not sealed.' 3 Barn. & Cres. 353-356, Petrie v. J. Bury and another, ex'rs. of James Bury.

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4 Barn. & Cres. 345–351.

§ 26. *If an agent badly secure an annuity, he is not liable without a reward, &c.* The plt. stated in his declaration that in consideration he would employ the defts. at their request to vest £1400, in an annuity, they promised to do their duty in the premises; that the plt. did so employ them, but they did not perform their duty, &c., but took insufficient security, whereby the plt. lost his money. On motion in arrest of judgment, held, the count was bad, as it did not state that any reward was to be paid to the defts., or that they were employed in any particular character, so as to make them responsible for taking bad security, though not guilty of negligence or dishonesty. Plt. cited Coggs *v.* Barnard and Elsee *v.* Gatward. The court said there were three counts, and if either was bad the judgment must be arrested. But the court seemed to think that if the defts. had been described as attornies they would have been liable, or if they had acted dishonestly, or with gross negligence. For the defts. was cited Bourne *v.* Diggles, 2 Chitty, 311, a case like the present, only the person employed was called an *attorney*, and held to be sufficient.

CHAPTER CLXI.

DEBT ON AWARDS AND ARBITRATION BONDS.

ART. 3. *Con.*

4 Pick. 454, 455, Coffin *v.* Cottle.

§ 6. Plt. sued the deft., as administrator on promises of the intestate and of the administrator. Action was referred under a rule of court, with all demands between the plt. and the intestate. Held, the administrator could legally enter into the rule, and under it, not material whether the counts were good in form or not, rightly joined or not, &c.: 2. The referees might allow advances, made by the plt., on account of debts due from the estate of the intestate, though they became due and were paid after his death: 3. And could award damages *de bonis testatoris*. 'For if due, the administrator would have been obliged to pay them, and would have charged the amount in his administration account.' As to awards 16 East.; 3 Rand. 27; 1 Bos. & P. 91–175; 1 Saund. 327.

§ 21. 6 Cowen, 581, case of Wallis, held, an attachment for not performing an award on the submission being made, a rule of court cannot go till the rule be served, and performance demanded. The attachment is founded on the idea that there has been a contempt of court, in disobeying the rule.

CHAPTER CLXII.

DEBT ON BILLS, BAILMENT, &c.

§ 21 *con.* And it lies against a stockholder on the bank charter, making the stockholder personally liable for the amount of the bills: nor does the statute of limitations apply in such cases. Such a note, payable to A or bearer, is, in effect, to bearer, and the holder is the bearer, and he may sue such stockholder, ibid. 1 Mason, 243, Bullard v. Bell.

CHAPTER CXLIII.

DEBT ON BY-LAWS OF CORPORATIONS.

§ 9. And 12 Wheat. 64–116, Bank of the United States *v.* Dandridge and his six sureties. A majority of the court held, a corporation may act *without writing*. This was an action of debt on the bond of Dandridge, principal, and cashier of the Branch Bank in Virginia, and his sureties, to secure the faithful performance of his duties as cashier. Held, 1. That evidence of the execution of the bond, and of its approval by the board of creditors, is admissible, though there was no record of such approval; and that the bank may prove the fact of such approval by the board, by *presumptive* evidence, in the same manner as such fact might be proved in the case of private persons not acting as a corporation, or as the agents of a corporation: 2. Where in such case, the cashier is duly appointed, and permitted to act in his office for a long time, under the sanction of the directors, it is not necessary his official bond be accepted by the board of directors *as satisfactory*, according to the terms of the charter, in order to enable him to enter, legally, on the duties of his office, or to make his sureties liable for the non performance of those duties: 3. The charter and the by-laws are to be considered, in this respect, as *directory* to the board, and not as *conditions precedent*. In page 64 to 90, Story, J., gave the opinion of a majority of the court, and cited and examined many authorities. Chief Justice Marshall dissented, pages 90 to 116, and also cited and examined many authorities. ART. 1. *Con.*

§ 3 *con.* Tax in the State of Ohio. By a statute of Ohio, passed Feb. 8, 1819, a tax of $50,000 a year was laid on each branch of this bank located in that State, and the auditor was empowered and directed to issue his warranty, under his seal of office, directed to any person, commanding him to collect the said tax, to enter the bankinghouse, and demand the same, and if not paid, to levy the amount on the money or other goods of the bank; the money to be retained, and the goods to be sold as if taken on *a fi. fa.* ART. 3. *Con.* 9 Wheat. 739–903, Osborn & al. Appellants. v. the Pres. Direct. & Co. of the Bank. of the U. States, respondents, in Chancery.

September term, 1819, a bill was filed in the circuit court of Ohio, in the name of the president, &c., and signed by solicitors of the court, praying an injunction to restrain Ralph Osborn, auditor of the State of Ohio, from proceeding against the complainants, under said statute. After notice, &c., the injunction issued on execution of bonds and security in the sum of $100,000, was served, &c., &c. The State officers, Harper and others, proceeded on their State warrant, after the *sub poena* and injunction were served, and by violence, took from the branches $100,000 in special bank notes, and delivered the money to Curry, the State treasurer, and to Osborn, &c. The object of the bill was, the restoration of the the money to said branch, &c.; and answers were put in by the State officers, by which, the bill filed, and various proceeding, the facts appeared, and in substance were agreed, that is, that the said $100,000 were so seized, and $98,000 were held in deposit, &c. On the facts the cause was heard, and on the decrees, *nisi* against Osborn and Harper, and the court decreed they restore to the bank the sum of $100,000, with interest, &c. Appealed to the supreme court of the United States, which recognized the main decisions in the Maryland case, and further held, 1. It is not necessary for the attorney or solicitors of this, or any other corporation, to have a power under *its seal:* 2. Whatever may be his power, it is not a ground of reversal for error, in an appellate court: 3. In general, the answer of one deft. in equity, is not evidence against another; otherwise where one deft. succeeds another, so that the right of one devolves on the other, and they become privies in estate: as here one State treasurer succeeded another: 4. Where the deft. is restrained by injunction, from using money in his possession, interest is not charged: 5. An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges: 6. In general, an injunction will not be allowed, nor a decree rendered against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the court, (as in the case of a sovereign State,) the rule may be dispensed with: 7. A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be totally lost to the owner; such as negotiable securities and stocks: 8. The circuit courts of the United States have jurisdiction of a bill brought by the bank of the United States, for protecting it in the exercise of its franchises, which are threatened to be invaded under the unconstitutional laws of a State; and as the State itself cannot, according to the eleventh amendment of the constitution, be made a party deft. to the bill, it may be maintained against

the officers and agents of the State, who are entrusted with the execution of such laws: 9. A State cannot tax said banks; and any attempt on the part of its officers or agents, to enforce the collection of such tax against the property of the bank, may be restrained by injunction from the circuit court.

One main objection made by the counsel for the State, was, that the State itself should have been a party to the suit. Answer, it is enough there are parties before the court to enable it to make an effectual decree, though some other parties be omitted. Cited United States *v.* Peters, 5 Cranch, 115; the Grenada case, in which the fiscal rights of the sovereign were determined in a suit brought by an individual to recover back from a collector taxes illegally paid, and unconstitutionally levied by that officer: Campbel *v.* Hall, ch. 9, a. 4, s. 6. Another objection, that the bank should have brought *trespass* or *trover* against those who seized the property. Answer, the tax was an *annual vexation*, and an injunction proper, and reasons: want of a power of attorney, if anything was in abatement, and cured by the judiciary act of 1789, ch. 28, s. 34, the act of congress of 1816, s. 7, incorporating the bank, expressly authorized it to sue in the circuit courts, and congress had power so o enact, and reasons. On the part of the State it was said, congress could not vest this power in the circuit courts, and were cited the United States' Bank *v.* Deveaux, ch. 76, a. 10, s. 30; and Hope Ins. Com. id; 7 Cranch, 505: the best answer is the clause of the constitution, by which 'the judicial power is extended *to all cases* in law and equity, arising under *this constitution, the laws of the United States*, and *treaties made*, or which shall be made, under their authority.' This clause, expressly, as reason dictates, makes the judicial power coextensive with the constitution, the legislative, and treaty power. Thus, whenever *any case whatever* arises under, or grows out of this constitution, a law or treaty of the Union, the judicial power, by this clause, is extended to such case, and it would be absurd in the last degree, that there should be a constitutional, legislative, or treaty rule, or law of human conduct in the Union, and as to it, no judicial power: there might as well be, as to it, no executive power. And of what value would such a law or rule of human conduct be, without any *judicial* or *executive* power to give it effect?

Note. Harper was employed to collect the tax, and seized the $100,000. Mr Justice Johnson dissented 'on the point of jurisdiction.' He gave his opinion in over thirty pages; but as to the real point of his dissenting, we have the grounds of it in the following words. He, speaking of the bank's suing in the circuit court, said, 'In its averment, those on which it claims jurisdiction, it simply takes two grounds: 1. That it was incor-

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porated by an act of congress; 2. That the right to sue was given it by an act of congress; but there is no averment that the cause of action was *a case arising under a law of the United States.*' 'It was a case emphatically arising out of an act of the State of Ohio, operating on the domicil of the bank, which, although purchased in right of an existence, metaphysically, given it by congress, was acquired and held according to the laws of Ohio acting on its own territory.' It is true the case did not arise, wholly, under a law of the United States. The act, and certain laws of Ohio, made part of the case. On this point of jurisdiction, suing in the *circuit* court, the supreme court directed a second argument. The chief justice in giving the opinion of the court, said, 'the point is, the right of the bank to sue in the courts of the United States.' 'The appellants contest the jurisdiction of the court on two grounds: 1. That the act of congress has not given it: 2. That under the constitution congress cannot give it.' It is not understood Justice Johnson made the second objection: as to the first, the chief justice observed, the words of the act are, 'that the bank shall be made able, and capable in law;' 'to sue, and be sued, plead, and be impleaded, answer, and be answered, defend, and be defended, in all State courts, having competent jurisdiction, and in any circuit court of the United States.' The chief justice said farther, 'these words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," in every circuit court of the United States.' The chief justice then, in a few pages shows clearly, to my mind, that the clause in the charter of the bank, which authorizes it to sue in the circuit courts, is constitutional. Among other things noticed, the *judicial* is coextensive with the *legislative* power, in the constitution, and that in almost every cause in the federal courts, there is some mixture of *State* and *court* law on which the case may arise, or on which it is decided, &c.

9 Wheat. 904.

Art. 5. *Con.*

§ 3. The charter of a society incorporated, provided that 'should any member neglect to pay his arrearages for three months he shall be expelled.' Held, an expulsion of a member delinquent, without notice to him, and without a vote of the society, was illegal.

2 Serg. & R. 141.

Where the charter required two thirds to meet, to transact business, and it appears from the minutes, 'after due investigation, the corporators met,' held, this proved a meeting of two thirds, as it was not the custom to mention the names or number of those present.

Commonwealth v. Woelper & al., 3 Serg. & R. 29.

A corporation empowered by charter 'to make rules, by-laws, and ordinances, and to do everything needful for the good government and support of the congregation,' may lawfully make

a by-law giving the president of the corporation the power of appointing inspectors of the election of corporate affairs: 2. It may legally make a by-law, providing that no ticket shall be counted at an election, 'if, besides the names, there are other things upon the tickets:' all elections by the charter being by ballot: 3. Under such by-law, tickets were rejected on which an eagle was engraved. Vol. V. Ch. 143. *Art.* 5. *Con.* 3 Serg. & R. 29.

§ 27 *con. A bank in Ohio can sue in Virginia.* The Bank of Marietta *v.* Pindal, *v.* Mc Call, and *v.* Wilson. This bank brought three actions of debt in a *law* court in Virginia, on promissory notes made to third persons, payable at said bank, and assigned to it. General demurrer to the declarations and joinder. Defts'. pleas stated, the notes were made and signed by them, and *endorsed* in Virginia, and denied the plts. were a corporate body, by any law of Virginia. To these pleas, the plts. demurred and joinder. Judgments for the defts. in the lower courts: reversed in the supreme court of appeals, and judgments for the plts. The defts'. objection was, that this bank was a *foreign* bank, so could not sue in Virginia. The court said, it is clear, if the plts. were *natural* persons of Ohio, they could recover: but the plts. are *artificial* persons in Ohio, made such there by law; hence, have the 'same capacity to contract and acquire rights, in their corporate name and character, as if they had been *natural* persons:' 2 Rand. 465–477; cited 10 Mass. R. 91, ante s. 26: the pleas merely stated the notes were *endorsed* in Virginia, not that they were *there endorsed* to plts., or *there assigned to them.* Had this been the fact, and so stated, the court thought the plts. could not have recovered. As a *foreign* bank can make no *primary* contract in Virginia, 'the notes might well be *endorsed in Virginia,* and assigned in Ohio.'

§ 28 *con.* Overseers of the poor of a town in New York, are a corporation for certain purposes; may sue and be sued of necessity, in order to execute the particular trusts reposed in their office; therefore, they are subject to actions for debts contracted by their predecessors, *as overseers.* Todd & Mc Cord, *overseers* of the poor of the town of Cortlandt *v.* Birdsell, 1 Cowen, 260–264.

So the individual member is not held, if, in such a manner, the powers of the corporation be enlarged at A's request, by statute, and without his consent. 1 N. H. Rep. 44–48, Union Locks and Canals *v.* Towne.

N. York Firemen Ins. Co. *v.* Ely & Parsons, 2 Cowen, 678–72.

§ 41. How their powers are construed. No power but what is expressly given, or necessary to carry into effect those so given; therefore where a corporation is empowered to loan monies on certain specified securities, it has no power to loan monies on sureties in any other forms. Hence, they cannot

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loan on promissory notes, if. not included in the forms allowed; or to carry into effect the purpose for which it was established. Same principle, 5 Johns. R. 383 ; 3 Barn. & A. 9–12.

CHAPTER CXLIV.

BONDS.

ART. 5. *Con.* 5 Pick. 181—182, Stocking *v.* Fairchild.

§ 8. Entry *sur disseisin.* Demand in mortgage, &c. Plt. gave in evidence a paper, on one side of it was a deed, apparently absolute, dated and duly executed; on the other side a writing in the usual form of a condition to a mortgage, without date, signature, or seal. Held, this condition was a part of the deed. The deed and condition were recorded.

ART. 9. *Con.*

§ 4. *A several bond*—As 1 Barn. & Cres. 682–689. Debt on bond given by Wegg to the plts. Collins & al. for £1000. On oyer the bond was—'I, George B. Mainwaring, am held and firmly bound to, &c. (the plts.) in the sum of £12,000, for which I bind myself, &c. And I, J. E. W. am held, &c. in the sum of £3000, for which I bind myself, &c. And we, P. P., S. J., and W. E, are also held, &c. in £2000 each, for which we bind ourselves, and each of us for himself, for the whole and entire sum of £2000 each; and we, Sir N. C. G. S. W. (the testator,) and J. W. are also held, &c. in £1000 each, for which we bind ourselves and each of us for himself, for the whole and entire sum of £1000 each.' The condition was, that Geo. B. Mainwaring should render a true account of all monies received by him as treasurer of the county of Middlesex. Held, this was a *several* bond only, and that the obligees, by removing the seal of one obligor did not render the bond void, as to the others. Collins and others *v.* Prosser and others, executors of G. L. Wegg, deceased. See ch. 42, a. 1, s. 9; ch. 175, a. 5; ch. 107, a. 1, s. 9; ch. 107, a. 1 to 20, a. 2, s. 1 to 6. Cited Bridg. 65; 3 Taunt. 87; 4 M. & S. 23; 6 Ves. 805; Poph. 161; 4 Taunt. 593; 2 M. & S. 563, not cited before in this work.

ART. 12. *Con.*

§ 1 *con.* In a suit on a bail bond forfeited, the bail can only plead *comperuit ad diem.* A demurrer to a plea of an *offer to surrender the principal,* in an action on the bail bond; held good; and a plea of payment in an action of a bail bond permitted to be withdrawn for the purpose of pleading *comperuit ad diem.* 4 Har. & McH. 5, in a note, Osborn *v.* Jones, and 5 Burr. 2683.

ART. 13. *Con.*

§ 21 *con.* Samuell *v.* Howorth, 3 Merivale, 272; 18 Ves. 20: 10 East, 34, Moore *v.* Bowmaker; 6 Taunt. 379: 2 Johns. Ch. R. 554; 2 Marshall's R. 81; 5 B. & A. 187.

Shewing how the surety is discharged, if the creditor, by express agreement with the principal, vary the terms of the contract to the disadvantage of the surety; and see ch. 169, 4 Har. & McHen. 41–43.

Vol. V. Ch. 144. *Art.* 14. *Con.*

§ 3 *con.* The penalty in the sheriff's bond demanded of his sureties, must be on motion 2. Debt will lie only for the damage actually sustained by the sheriff's failure to return the execution: 3. Though an averment of a breach of the condition of the bond may not entitle the plt. to all he demands, it may entitle him to recover what he is entitled to in consequence of the breach: 4. Judgment against the sureties of a sheriff, is not evidence against him: 5. Nor are his admissions evidence against them.

4 Rand. 317—324.

§ 16 *con.* An officer *annually* elected, gives a bond for the faithful discharge of the duties of his office. His sureties are bound only *one year*, though no time be specified in the bond, and though he be reelected several years in succession. See art. 13, s. 20; this chapter and ch. 169, a. 5, s. 9.

1 M'Cord, 41.

§ 20 *con.* 4 Rand, 608, is cited, Keeling *v.* Ball, 1 Peake's Evid. Appendix, 184, where held that a bond to which there were subscribing witnesses, being lost, and the names of the subscribing witnesses being forgotten, proof of the acknowledgement of the debt by the party, and his promise to pay it, was held admissible, and sufficient evidence of the execution of the bond; and proof the bond was printed, and in the usual form, was held to be sufficient evidence that it bound the *heirs*.

Action on a lost note negotiable, payable to bearer, brought by the holder. Held, this action at law cannot be maintained by the holder on his proving it lost, after it became due. *Aliter* if he prove it destroyed, so if not negotiable; and if negotiable, and it appears not to have been negotiated, but if only lost, the only remedy is in equity, which alone can afford the deft. adequate protection against future liability. See ch. 178, a. 10, s. 3, Pierson *v.* Hutchinson, 2 Camp. 211; 3 id. 324; 4 Taunt. 602, Davis *v.* Dood; 6 Esp. R. 76.

Rowley *v.* Ball, 3 Cowen, 302—313

Art. 16. *Con.*

§ 2 *con.* Debt for the escape of one Lawrence from the deft's. custody on a *ca. sa.* at the plt's suit on a judgment for $652 17. The declaration contained three counts, in substance alike, except the escape was stated on different days. Deft. pleaded, 1. *nil debet*, with notice of special matter: 2. In answer to the first count, a return before suit brought; and that the deft. after that escape and return, safely kept the prisoner in his custody; till he went out of office, and then delivered him over to his successor. Replication the deft. did not keep and detain the prisoner in his custody in manner and form, &c. Other pleas not material. Court held, first: The plt. could recover but on one count; only one judgment on which the pri-

Middle District Bank *v.* Deyo, sheriff, 6 Cowen, 782-766.

Vol. V. Ch. 144. *Art.* 16. *Con.*

soner was committed: 2. The court understood the plea to state the deft. *continually* kept the prisoner after his return; and if all this was *material*, the plt. must recover, for the deft. did not keep him *continually*, for he escaped again after his first return, sued three times, and returned: 3. *Modo et forma*, puts in issue only matter of *substance*: 4. The *continual* keeping is not material, for it is a good defence, if the prisoner return, or is taken on fresh suit, and in custody when the action is brought. This was the essential point. So is Bonafores and Walker, and all the English cases prior to Griffiths *v.* Eyles, 1 Bos. and P. 413; Chambers *v.* Jones, 11 East, 406. These cases were denied, and it seems all the American cases agree with Bonafores and Walker, &c.

1 Cowen, 309—315.

§ 9. Debt against the deft., sheriff of ——, for the escape of A, taken in execution. Held, among other things, that it is settled that a sheriff, who is sued for an escape, cannot protect himself by errors in the process, though erroneous it protects him in making an arrest. The judges differed as to the *ca. sa.* whether void or voidable only, being tested out of term. If void, the deft. was not liable for letting A escape, if voidable only, was bound to retain him.

Rogers *v.* Coleman, 3 Cowen, 62—67.

§ 10. Debt on bond for the performance of covenants Plea *non est factum*. Thereon the plt. proceeded to trial, and took a verdict, not having assigned breaches, and no damages assessed by the jury. Held, the plt. might, afterwards, assign breaches, and have his damages assessed on a writ of inquiry, under the statute, (Sess. 36, ch. 56, s. 7, 1 R. L. 518.) 19 Johns. R. 311, Notes; 3 Cowen, 62 to 67, and English authorities cited, and the act of 8 and 9 W. 3, ch. 11, near the same as said New York act.

§ 11. In declaring on a bond conditioned to pay a judgment in three months, or surrender the body of the deft. in execution at the plt's. suit in thirty days thereafter; the taking out execution by the plt. within the thirty days, is a condition *precedent*, and must be stated in the declaration: 2. If the performance of the condition of the bond be prevented by the obligee's omission, the obligor is discharged.

Whitney *v.* Spencer & Grant, &c. 4 Cowen, 39—41.

Art. 17. *Con.*

§ 2. A bond for the liberty of the yard to a poor debtor, does not bar an action against the sheriff for an escape, unless it be double the face of the execution. But if for a less amount, it is valid against the obligor, and in no case need it be double the face of the execution, and the officer's fees.

2 N. H. Rep. 152.

2 McCord, 29.

A deft. convicted of rendering a false schedule under the prison bounds act, is excluded all benefit under that and the insolvent debtor's act *in any case*. A bond for the prison-bounds is forfeited if the prisoner make no schedule in forty days: 2. A schedule filed in another suit at a former period, is not a com-

pliance with the act: 3. The amount due on the execution is the amount of damages in the action on the bond, and no other need be proved. 2 McCord, 135.

After the execution of the bond for the debtor's liberties, the sheriff is not liable for the debtor's escape. The action was debt against the sheriff for an escape of a debtor, committed on execution; plea, said bond, &c. Plt. demurred to it; plea good; bond good at common law. 3 Greenl. 447-450. 3 Greenl. 156-166.

§ 13 *con.* Debt on prison bond. If the principal, deft., imprisoned on mesne process, continue a true prisoner, &c., held, the penal sum must be double the sum, to the amount of which, the officer is directed to attach, and in case of escape, it is not subject to the equitable powers of the court, (Sup. J. Court:) as a bond is given by one committed on execution: the verdict found an escape. In the case of mesne process there is no certain debt or sum: see statutes 1784, ch. 41, s. 9, 1810, ch. 116, and 1811, ch. 167. 17 Mass. R. 175-178.

A prisoner wishing to be admitted to the prison bounds, applies to the sheriff, and offers to prepare a bond with ample security, and the sheriff refuses to admit him to the rules, or to take any bond, such conduct is a waiver, by the sheriff, of any farther act to be done by the prisoner, even supposing the law required him to prepare or tender a bond with ample sureties. 1 Hawks, 427

The defts. in an action on the prison bounds bond, are estopped to plead the person to whom given, as jailor, was not in fact jailor at the time. 1 Marsh. 63, if the assignee of such a bond sue, he need not aver the obligor's escape. Crump v. Bennett, 2 Litt. 211.

Debt on prison bond, &c. The sheriff, for his security, took the debtor's prison bond for his enjoying gaol limits. This was valid when taken; afterwards the debtor was committed to close confinement for felony. Held, this vacated the bond, and the sureties in it were discharged. 3 Cowen, 128-133.

CHAPTER CXLV.

DEBT ON THE GAMING ACTS.

§ 21. Under the second section of the act to prevent excessive and deceitful gaming, (Sess. 24, ch. 46; 1 N. R. L. 152,) in an action brought by the losing party, against the winner, to recover back money lost, at play and paid; the plt. may declare, generally, in debt for money had and received, without stating the case pecially or referring to the statute; but it is otherwise when a action is brought by a common informer.

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CHAPTER CXLVI.

DEBT ON JUDGMENTS.

17 Mass. R. 488.

§ 17 *con.* The creditor cannot sue a judgment where the execution issued thereon, is not returned into the clerk's office, but the sheriff's return, as to the legal qualifications of the appraisers of land is conclusive and not to be questioned in an action on the judgment.

Art. 7. *Con.*
1 Pick. R. 497 —500.

§ 27 *con.* One so discharged on stat. 1816, c. 55, cannot be arrested on mesne process in a suit on the former judgment; and if arrested, he may abate the writ : 2. Stat. 1787, ch. 28, s. 3, requires a technical conviction of perjury, in order to avoid the effect of taking the oath, and it is ill to reply, and not allege such conviction, and if it do not point out wherein the debtor swore falsely.

Art. 8. *Con.*

§ 2 *con.* But after an escape on *mesne process*, with or without license from the officer, voluntary or negligent, the right of recaption continues. This arises from the nature of the officer's duty as to mesne process, in which he is only to keep the deft. so as he have him before the court at the return of the writ. 1 N. H. Rep. 367–371, Langdon *v.* Hathaway, 1 Saund. 35 ; 5 John. 182.

§ 18. Lies against two joint debtors though one was not arrested and did not appear in the original action, the judgment is *prima facie* evidence against the party not brought into court. Columbia Bank *v.* Newcomb, 6 John. 98 ; Taylor *v.* Pettibone, 16 John. 16. But by statute 1 R. L. 521, s. 13, the execution runs not against him or his estate.

CHAPTER CXLVII.

DEBT FOR LEGACIES.

§ 24. Pelletreau *v.* Rathbone, 18 John. R. 428. Held, no action lies against *terretenants*, for a legacy, though an annuity for life is expressly charged on the real and personal estate of the testator ; but the proper remedy is in a court of chancery.

CHAPTER CXLVIII.

DEBT FOR PENALTIES.

Art. 1. *Con.*

The surety is not held in an administration bond, if the administrator do not execute it. 2 Pick. R. 24, Wood, Judge, *v.* Washburn, &c.

§ 11 *con.* Esp. on P. Stat. 57, a statute forbids a thing under a penalty to be paid to the party grieved, and prescribes no mode of recovery, he shall have debt. VOL. V. CH. 148. *Art.* 1. *Con.*

§ 13. General rules. Where a statute declares that 'any person,' doing a certain act, offends; and that every person so offending shall forfeit and pay, &c. It depends on the nature of the offence as being *entire* or *several*, whether several persons jointly and simultaneously committing it, are to be subjected, the whole to one penalty, or each to the whole penalty: 2. Where a statute gives double the value of goods by way of *penalty*, to be recovered in an action of debt, the jury may find the value of the goods, and the court double the value in their judgment. Enough the jury say value of the goods. The single value is intruded, nor need the verdict use the word *single*, or say the *single* value in terms: 3. It is not necessary in actions of debt for penalties of uncertain amounts, as depending on the value of goods, &c. that the plt. recover the exact sum or amount laid in his declaration. See sect. 2, this art. Rex *v.* Clarke; Barnard *v.* Gostling & al. in error; 4 Bos & P. 248—251, several; Bul. N P. 196, Newcomb *v.* Butterfield, 8 John. 342—346, as to treble damages, and cases cited. Rex *v.* Bleasdale & al. 4 D. & E. 809, for one offence only; two persons must be joined, and Hardman *v.* Whiteacre; Bul. N. P. 189; 5 Cowen's R. 678—687, Warren *v.* Doolittle, in the court of errors, N. York; Partridge *v.* Naylor, ch. 196, a. 6, s. 4, one penalty against all. 2 East, 569—575, Barnard *v.* Gostling, and several cases therein cited. McQuillin *v.* Cox, &c. ch. 139, a. 8, s. 14, debt lies for an indeterminate sum. Cross *v.* U. States, 1 Gall. R. 26; for single value in the verdict, &c.

In debt for a statute penalty, the offenders may be sued jointly or severally but the plt. can have but one satisfaction. 2 Greenl, 130—131, not necessary to allege the defts. knew who owned the logs. See Boutelle *v.* Nourse, a. 1, s. 4; Burnham *v.* Webster, a. 8, s. 10, Maine stat. 1821, ch. 16. ART. 5. *Con.*

3 Greenl. 203, Howes & al. *v.* Shed. A illegally takes logs from a river against said statute. B knows this, but buys the logs; he incurs the penalty of the said act: Was debt.

§ 1 *con.* The bank acts of Massachusetts being recognized in the public statutes of Maine, are thereby become public acts, and may be proved by a printed copy: 2. If a statute contains provisions of a private nature, as to incorporate a bank, &c., yet if it contains also, provisions for the forfeiture of penalties to the *State*, or for the punishment of public offences in relation to such bank, it is a public statute: 3. The act incorporating the Bank of the United States; see Samuel *v.* Evans, s. 3, this article, Bul. N. P. 224. ART. 8. *Con.* 2 Greenl. 301—305.

VOL. V. CH. 148. *Art.* 11. *Con.*

§ 7 *con.* Trespass for taking and carrying away the plt's. cattle. Deft. justified taking them going at large without a keeper. The plt. made objections to the defence. Held, 1. The court will presume an annual town meeting duly notified, if the contrary do not appear: 2. An application for a warrant to appraise the cattle impounded, need not be in writing: 3. An oath to the two appraisers, 'faithfully to appraise the creatures named in the warrant according to their best skill and judgment,' was sufficient: 4. Enough the appraisers return on the warrant, only the value of the cattle appraised, without stating the penalty and charges: 5. A vote of a town to restrain cattle going at large within the limits of the town, (Andover) is binding on persons not inhabitants, whose cattle are found so going at large: 6. A turnpike road, if a highway within the meaning of the statute, &c.: 7. An inhabitant of a town so taking up such cattle, may impound them in a private close: 8. Notice given to the owner of the cattle before they are impounded, of the facts and of the cause of their being taken, and after the impounding, of the place where impounded, is a legal notice: 9. If the owner avoid the tender of the surplus of the appraised value, and immediately sue the field driver, the tender is dispensed with. See Fences, ch. 66.

4 Pick. 258—264, Gilmore *v.* Holt & al.

ART. 12. *Con.*

§ 5 *con. Town office:* the penalty for not serving in, does not extend to a collector of taxes: 2. If he neglect to find securities, his office is vacant, and another may be chosen. 1 Greenl. 248–250.

ART. 14. *Con.*

Since the original was prepared for the press, Mr Espinasse's treatise on the law of actions on penal statutes in general, has been published in the United States. This he views as rather a new effort. The few following rules, principles, and cases, may be useful in our practice taken from it, in addition to what is found in the different parts of this abridgment.

§ 1. In England, and in some of our States, statute penalties can be recovered by action, or information only; but no authority is found to warrant a *common informer* to proceed *by information*, unless that mode is expressly directed by the statute, p. 57: notice required before the suit or affidavit, &c., such requisition must be strictly complied with: pp. 51, 52, cites 2 Stra. 1247: if a *common informer sue in his own name*, generally he may declare *qui tam, but not e converso:* 65, 66 cites 3 Wils. 141, &c.; 4 Burr. 2417: the day of committing the offence is *inclusive*: p. 73, Hob. 139: hence, if committed 9th of October, the year expires the 8th of the next October; and 2 D. & E. 155.

§ 2. *The venue;* but little is to be added as to this. Where the remedy is *local*, that is required to be in the county in which the offence is committed, and the action or information is brought

in another country, the plt. *q. t.*, cannot have judgment though not objected to *by plea:* p. 81, Cro. El. 785; 21 Jac. 1, ch. 4, s. 38; the party *grieved*, may sue by bill or action, and where he pleases, if there be no statute to restrain him: pp. 81, 83, 59, 60, Cro. El. 645; a mere act of *omission* is not *local*: Hob. 251, Semble: an attorney is entitled to his local privilege in the proper court; pp. 49–141: where the offence is committed, partly in one county and partly in another, it may be laid in either, that is, where *two facts* are necessary to constitute the offence; p. 84, 2 D. & E. 241: but where only *the inducement* to the offence has been in one county, and the *offence itself* in another, the suit must be in the latter; p. 86, 2 Bos. & P. 381; 4 East. 385: the offence when *local*, must be proved where tried; p. 141: if a distress be taken in one county and impounded in another, the action may be in either; p. 85, 2 Taunt. 252.

§ 3. *Evidence on the general issue.* Deft. need not plead the statute of limitations of one year or more, for if the suit be after the time limited, it is void: p. 78, 1 P. Wm. 437: but on *nil debet* the deft. cannot give evidence of a former recovery for the same offence by the plt. or another, or another suit pending for the same cause of action and offence, nor matter of record; either must be pleaded; pp. 131, 132. Bul. N. P. 197; 1 Stra. 701: and the *true time* of commencing each action may be proved; pp. 132, 133, 2 Stra. 1169; 2 Leo. 161; the time laid in the declaration, the plt. must prove in part, but he need not prove the *whole time therein laid;* but he recovers as far as his evidence goes within the time so laid in it; p. 145, Cro. J. 529, Cro. El, 835: a contract must be proved as laid; p. 146: *parol* evidence is used as in other cases; p. 147.

It is enough the record produced, substantially proves the plea it is adduced to support; a variance in a part not material to the issue will not vitiate; p. 147, Hob. 209.

If the action or information be on a penal statute, and another exempts the party from the penalty, it must be pleaded, and cannot be in evidence on the general issue of not guilty, or *nil debet;* p. 127, Bul. N. P. 225: *aliter*, as to a proviso in the same statute, for his case is on the whole statute; p. 127, Bul. N. P, 225: Sir W. Jones, p. 320; but the matter that is properly in evidence on the general issue must be *a matter of fact*, for if matter of *law*, it is to be pleaded; pp. 127, 128, 2 Roll. Abr. 683: but as to *provisos* and exceptions in statutes see ch. 196, a. 3, and in other parts of this work.

§ 4. *Who may be plt. &c.;* not an infant; p. 19: nor a corporation, unless expressly made plt. by statute. There can be no informers or *qui tam* plts., but those constituted by the statutes, giving the penalties sued for. They are appointed as

mere instruments to give effect to penal statutes, not on account of any rights or claims they have: nor is there any common informer or *qui tam* plts., at common law. But wherever a statute prohibits a thing under a penalty, and that, or any part of it, is given to him who will sue for the same, any person may sue for the penalty, with a few exceptions of those under legal disabilities, as above; pp. 18, 19, 20, Bul. N. P. 198; 2 Stra. 1241: and if an informer in the first statute, and others add penalties and do not name him, still he is an informer; p. 13: If a statute empowers a common informer to sue, he has debt; p. 56: but he cannot sue for less than the whole penalty; p. 119, Bul. N. P. 196; Cro. Jac. 496: but it is said he may sue for his own share only; p. 122: if he sue after the year, it may be well for the king's part, though not for his own; p. 76, Bul. N. P. 195: and an information is commenced as soon as it is in court; p. 135, Cro. El. 261: so is the action as soon as the writ is sued out, if regularly continued; pp. 135, 136, 6 D. & E. 617.

§ 5. *Judgment, &c.: plt. or informer may have judgment for part:* as where he sues several persons jointly, for an offence against a statute, which in its nature may be committed by a single person alone, some of them may be acquitted, and some, by verdict, found guilty; for though the words of the information are *joint*, yet in judgment of law the charge is several against each deft.; so in cases of *torts*, less may be found where more is charged. *Tort feasances* are like trespasses: the verdict may find the deft. guilty of part, and not guilty as to the rest. *Aliter as to contracts.*

So if a declaration or information charges several offences against a statute, some well made, some not, the plt. may have his judgment for those well charged; pp. 149, 150, 2 Roll. Abr. 707; Cro. J. 104: as debt for usury. One count is, the deft. corruptly lent £40; another lent £20, but did not say *corruptly:* last bad, on *nil debet*, and verdict for the plt.: urged he should not have judgment for any of the sums; but judgment was given on the good counts for the plt.; against him for those defective. If the jury find a general verdict for one penalty, for the plt. and he takes it on a certain count, and that is found bad in law, he is not allowed, afterwards, to apply it to another count, a good one, to which the evidence would warrant the application; p. 152, 3 D. & E. 446.

§ 6. *Statutes.* Every declaration or information brought to recover a penalty, given by a penal statute, must state and show the plt. *qui tam*, or informer, grounds his claim on the statute: so he must show how the plt., &c., is entitled under the statute, and the purposes for which the penalty is given in the statute 90, 91: so the deft. must be so described as to appear

to be a person the statute intends, and so one who has incurred the penalty of the statute. 12 Mod. 77, 4 D. & E. 227; 4 Burr. 2018; 2 East. 333.

As to exceptions and provisions in statutes, it is unnecessary to add; so as to reciting and misreciting statutes.

§ 7 *Several matters.* Deft cannot plead double. Esp. 125, 4 D. & E. 701.

A replication of coven to a plea of a former recovery is good: 139: the government cannot defeat the informer's share. See ch. 175, a. 12, s. 22: a license must be pleaded; p. 126.

§ 8. Eden on Injunctions, pp. 18, 19, Lord Thurlow said, 'where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principle intent of the deed, and the penalty only is accessional, and to secure the damage really incurred. But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the non performance of the agreement, a court of equity (except in certain cases of waste) refuses to interfere in restraining the recovery of such damages.' On these principles, courts of equity interpose to restrain proceedings at law, for the recovery of penalties; but not where forfeitures happen under the by-laws of corporations. See this distinction of damages liquidated or not, largely considered, ch. 28.

§ 9. Debt on bond, conditioned to maintain a bastard child, in the penalty of $400. The plts. assigned breaches according to the statute, 1 R. L. 518. The defts. (one a surety) pleaded payment of $264 25 cts., and *non dammificatus* beyond that sum: defts. proved payment of that sum. Held, the plts. could recover only $135 75 cts, the balance of $400, though they proved greater damages on the principal, a surety is not liable beyond the penalty: 2. The judgment on a penal bond, is properly for the penalty, in all cases, except where the demand is reduced by a set-off, within the 1 R. L. 515, 16: 3. If the penalty exceed $250 the plt. is entitled to supreme court costs, though the damages recovered on the assignment of breaches, be less than $250: 4. Interest cannot be taxed as costs on recovery on a bond, where the effect will be to compel the defts. (one a surety) to pay beyond the penalty of the bond. The same principles 6 Cowen, 57, 58, Harvey & al. *v.* Bardwell & al.

Fairlie & al. com'rs. of the Almshouse in the city of New York *v.* Lawson and Stanbury, 5 Cowen, 424, 425.

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CHAPTER CXLIX.

DEBT ON PROBATE BONDS, &c.

§ 2 *con.* This bond is given only to secure a surplus of the
1 Pick. R. 330. sales to be put at interest; the common administration bond secures the other parts of the proceeds of the sales.

1 Pick. 20. Debt on administrator's bond, conditioned to render an inventory, &c. Held, in stating a breach, in not returning one, or in not rendering an account, it must be averred he received
13 Johns. R. 437. some property of the intestate, though not necessary to state the exact amount.

3 Pick. 265–268, White, Judge, &c. *v.* Swain, adm'x. After the estate had been settled twenty years, she received a sum of money under the Spanish treaty of Feb. 22, 1819, belonging to the estate of the intestate. The judge sued, at the request of a creditor, whose claim had been ascertained by the commissioners of insolvency. Held, the action lay, and was the proper remedy, being on the probate bond. The main objection was, that the administratrix, as agent of the heirs, claimed the money.

Dubois *v.* Dubois, 6 Cowen, 494–497. Debt lies on a probate decree of the surrogate, for the payment of a legacy, and against the executor in his own right, and he may set-off a debt due to him, in his own right from the legatee in his own right. Several cases cited: 2. 'The decree of the surrogate, unappealed from, is conclusive, and determines forever the rights of the parties.' 'It may be enforced by imprisonment, and is certainly evidence of a debt due:' 4. 'Execution must go against the deft. personally, as for a private debt.'

3 Pick. R. 128 —143, Dawes, Judge, &c. *v.* Head & al. § 13. *Debt on probate bond.* To support this action for the benefit of creditors, there must have been, if the estate be solvent, a judgment ascertaining the debt, and a demand of payment on the administrator; if insolvent, an allowance of the debt by commissioners, a decree of distribution and such demand: 2. If a person domiciled, die in a foreign country, and there is administration, and here ancillary administration, and estate is insolvent, and commissioners appointed and claims allowed by them less than the assets here, the decree of the judge to pay the debt in full, is void, and no breach of the bond to refuse payment: 3. Two subjects of, and domiciled in a foreign country, and one is indebted to the other, and there is an administrator, and, here, an ancillary administrator, such debt, though contracted here, must be settled there: 4. If the estate of the deceased be not sufficient to pay his debts, the funds here collected, ought here to be retained for *pro rata* payments, on finding abroad what per centage the whole estate will pay: 5. The ancillary 'administrator here, is only the dep-

uty or agent of the executor abroad.' The court did not decide that the funds here should, or should not be applied to pay our citizens their whole debt, though its leaning was, that they should view it as a delicate question not settled in this country as late as March 1825: cause turned on other points. It seemed to be agreed the rule is the same in this, and in bankrupt cases. Chancellor Kent has collected many decisions to show such funds, in these cases, ought to be so applied to pay our own American creditors. 37th lecture, pages 329, 330, &c., he cites Holmes *v.* Remson, 4 Johns. Ch. R. 460, in which, the assignees of a bankrupt in England, included his property in New York, and he thought it was right, as they were first appointed, &c.; but he adds, 'but whatever consideration might otherwise have been due to the opinion in that case, and to the reasons and decisions on which it rested, the weight of American authority is decidedly the other way; and it now may be considered as a part of the settled jurisprudence of this country, 'that a prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here.' Cites 1 Harris & Mc Henry; Bush *v.* Mc Kean; Wallace *v.* Patterson; same 463, Milne *v.* Moreton, 6 Binn. 358; 1 Mason, 381; Mc Niel *v.* Colquhoun; 2 Haywood, 24; Topham *v.* Chapman, Constitutional R. 288; Taylor *v.* Geary, Kirby's R. 313; Ingraham *v.* Geyer, 13 Mass. R. 148; Ogden *v.* Saunders, 12 Wheat. 218.

How estate must be considered so, which was conveyed by the deceased to defraud creditors. 3 Pick. R. 168–170, Newcomb, Judge, &c., *v.* Wing and another.

§ 5 *con.* Debt on probate bond, special pleadings—Judge sued. Principal (executor) and sureties, after oyer had, plead Winship, executor, *omnia performavit*. The plt. replied, the executor did not account for certain property, valued in the inventory at $2,000. The defts. rejoined that the executor did account therefor, charging himself with $878, the proceeds thereof, and tendered an issue to the country. The plt. did not join it, but in his surrejoinder alleged the property was taken and sold on an execution against the executor; that he ought to have sold it for the full value, and not to have suffered it to be taken and sold on execution, and that he has not accounted for the full value thereof, as he ought, &c. Surrejoinder, held bad; on special demurrer thereto, stating causes. 1. Plt. did not, as he ought, join issue, &c.: 2. Did not confess the account, &c., in the rejoinder, nor avoid it, &c., but alleged matter foreign thereto: 3. Departure from the replication, &c., repeating the sale, &c., stated in the surrejoinder,

16 Mass. R. 291–293.

&c.: 4. Double, &c. Curia. There was a regular issue tendered, and it should have been joined. A departure also.

Interest of the judge of probate, the least excludes his jurisdiction, as where he had a demand against the estate of the deceased. Stat. 1817, ch. 190, s. 5. But he may release his demand; but to act as agent or attorney, to one interested in the estate to be settled, does not exclude his jurisdiction, though such acting is illegal.

5 Pick. 483—Cottle's Case.

§ 18 *con.* And it is sufficient this creditor or heir, &c., so endorsing the writ, have an *equitable* interest. 2 Greenl. 239. This interest specially stated. And 16 Mass. R. 524; no action lies on this bond, (except by a creditor whose debt is ascertained by a judgment or decree of distribution, or by an heir having his part ascertained) without leave from the judge of probate.

1 Nott. & M' Cord, 567–569.

No action lies on the bond to the ordinary, for the administration of intestate's effects, till the obligors be cited before him, to account for the administrator's doings, and a decree has been made.

2 N. H. Rep. 36.

Only the judge of probate can sue the probate bond in New Hampshire; and no other plt. in interest is recognized till after judgment. He recovers judgment for the whole penalty, and afterwards execution is awarded for such sums as are in equity due. Till judgment, there are but two questions, 1. Was the bond executed to the judge? 2. Has there been a breach of any of its conditions? Persons interested on different grounds, and entitled to remedies, are all subjects of after consideration.

5 Pick. 96–105, Brazier *v.* Clarke.

§ 25 *con.* Action of debt. Held, 1. If a legatee sue, and the executor defends by the direction of the heirs and other legatees, he is not guilty of waste though the plt. prevails: 2. One is not liable for waste committed by his coexecutor: 3. It seems otherwise, if they join in the probate bond: 4. If the survivor commit waste, and his sureties pay, &c., they have no contribution against the heirs, &c., of the executor deceased: 5. In an action on the probate bond against an executor for waste, in suffering the testator's property to be sold on execution, interest is allowed on the sum ascertained on a hearing in chancery, from the date of the writ only: 6. It seems executors, jointly and severally bound in the probate bond, may be liable for the acts of each other done *during their joint lives* on contract; so the representatives of one deceased, but not for an act done *after* one dies.

§ 29. 2 Greenl. 257, Potter, Judge, &c. *v.* Webb & al. His decree is *conclusive* on all persons, when not appealed from, and in a matter of which he has jurisdiction.

Debt on the administration bond. Where the administratrix brought an action against a deft. who owed nothing; but who, to save trouble, &c., both sides, paid a sum towards the costs, and made a present to the heirs, and the suit was withdrawn, and the jury in the action on the bond found there was no just debt due from said deft. to the estate. Held, the administratrix was not liable on the bond or accountable for said costs: 2. After an administrator has returned an inventory, he comes to the possession of property not included in it, he is not required to return a second inventory.

VOL. V. CH. 149. *Art.* 2. *Con.*

4 Pick. 50–54, Hooker, Judge &c. v. Bancroft.

CHAPTER CL.

DEBT ON RECOGNIZANCE AND BAIL.

ART. 1. *Con.*

§ 1. So in *Maryland* as in our States, generally, the bail bond is taken on the act of 23d H. 6; see ch. 144, especially a. 12, s. 1; Osborn *v.* Jones, 4 Har. & McH. 5. Sheriff must take reasonable bail if offered, and if he refuse, an action lies against him. He is judge of the security, and may take one or more sureties. The bond is for the benefit of the sheriff, and of the prisoner; till forfeited, the plt. has no interest in it. By statute 1715, ch. 46, s. 6, in Maryland, the amount of the bail bond, in some cases, is fixed. In Maryland, as in most of the States south of New England, the bail bond is only for *appearance*, and thereon *special* bail is taken. If the sheriff fail to take a bail bond, and the deft. to appear at the return of the writ, he is liable for an escape; not, if he takes one. If he takes one, the deft. is discharged from the arrest, and in his bail's keeping. On default of appearance, or to give special bail, the plt. has his election either to accept an assignment of the bail bond from the sheriff, (which he is obliged to assign by the statute of 4 and 5 of Ann, ch. 16, s. 20,) or proceed against the sheriff by amercement. In no case is the plt. obliged to take an assignment. 4 Har. & McH. 5, 6; cites 3 Vin. title Bail, pl. 11, 494, pl. 13.

The deft. may be held to special bail in an action on a bond, note, or bill of exchange, without an affidavit of the debt. 4 Har. & McH. 159. And if arrested out of his county, on motion and filing an affidavit of the fact, he is discharged with costs. 4 Har. & McH. 165; Stat. 1796, ch. 43, s. 14, 15.

Where the principal is confined in goal, under the mesne civil process of a State court, the circuit court has no authority to issue a *habeas corpus* for the purpose of bringing him to be surrendered in discharge of his bail. 1 Gallison, 2, where one of the bail cannot sue the other for contribution, ch. 169, a. 5, s. 1, Sureties.

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§ 2. 16 Mass. R. 447. Whenever a recognisance is taken for one's appearance to answer charges against him, it is material that it show the cause of taking it; decided on *scire facias* on one.

1 Greenl. 324-326.

§ 3. *Altering the bail bond, &c.* After the surety signed, and in his absence, but before delivery, the principal erased the sheriff's name, as obligee, and inserted that of the constable who served the precept, and this in his presence and at his suggestion: Held, the bond was not void as to the surety; not material and the surety's consent presumed; his intention of becoming bail not being affected; decided on *scire facias* against bail. The alteration was made by one of the obligors and before delivery; clearly not void as to him. The officer, the obligee, in such bond, is a mere trustee for the creditor; he is the real obligee. See Smith *v.* Crocker, ch. 139, a. 8, s. 8; Hunt *v.* Adams, 6 Mass. R. 519.

12 Wheat. 604.

§ 4. The bail is fixed by the death of the principal, after the return of the *ca. sa.* and before the return of the *scire facias*; and the bail is not entitled to an *exoneretur* in such case—expressed decided by the principles of English law, and is that of Maryland in the case. By it, by the *favor* of the court, the bail may surrender the principal after the return of the *ca. sa.* but not of *right*, and pleadable in bar.

6 Binn. 302-304.

§ 5. The general principle is, that bail is not demandable in trespass, as there is no standard whereby to measure it. This principle applies in several cases.

6 Binn. 353-360.

§ 6. As to *enforcing* contracts, the law where enforced, governs. Hence a French merchant sued in Pennsylvania, must give special bail though sued on a contract made in France, where merchants cannot be imprisoned for debt, except in certain cases.

Norton *v.* Burnum, 20 Johns. R. 337.

§ 7. In an action for a libel to hold to bail, the affidavit must state the libel, also some special reason to authorize the judge to grant the order for bail.

§ 8. The sheriff being attached, and for not bringing in the defts. body, pursuant to a rule of court, procured A (on promise of indemnity) to put in special bail in the original suit. Held, the sheriff could not sue on the bail bond, as there was an appearance according to the condition of the bond, and hence the deft. might plead *comperuit ad diem prout patet, &c.* In such case the sheriff, on being served with an attachment, should pay the debt and costs in the original action, and then sue on the bail bond, or the deft., for so much money paid. Mathison *v.* Forbes, 19 Johns. R. 292.

§ 9. Bail who are objected to, and do not justify, cease to be bail. 2 Cowen, 514.

§ 10. Though the deft. be discharged under the insolvent act, if he have time to plead the discharge, but omit to do so, after judgment, an *exoneretur* will not be ordered to favor his special bail on account of the discharge; they must surrender in the usual way. 6 Cowen, 596–7. Vol. V. Ch. 150. *Art.* 1. *Con.*

§ 11. Special bail is not discharged, because their principal is imprisoned on conviction for a crime, unless it be for life, or for a long time in another State, and 18 John. 35. 6 Cowen, 608–609, the plt. is not bound to know that special bail was put in without regular notice of bail given by the deft. 6 Cowen, 599.

§ 20 *con.* A prisoner on a capital charge, may be, in the discretion of the court, bailed, even after bill found. State *v.* Hill, 1 Const. Rep. 242. *Art.* 2. *Con.*

§ 23 *con.* And if the plt. do not in the first instance except to the insufficiency of the appearance bail, he cannot afterwards object to receiving him as special bail. Where appearance bail is required, the deft. cannot appear at the rules without giving special bail. 1 Munf. 284. Special bail to replevy the attached effects, and a plea to the action, ought to be received in behalf of the deft. upon an attachment against him as an absconding debtor, though he did not, when called, appear in person or by attorney; such bail and plea being offered at the term to which the attachment is returned executed, and before judgment on it, is pronounced. It is no objection to a bail special, given by one deft., that it takes no notice of the other deft. 1 Wash. 254. Appearance bail is not required by law, in actions of debt on bond, with collateral condition. Ruffen *v.* Call, 2 Wash. 181. Dunlap *v.* Laporte, 1 Hen. & M. 22. Smith *v.* Pearce, 6 Munf. 585.

§ 29 *con. Bail discharged by the imprisonment of the principal for crime.* As where there is bail on stat. 1817, ch. 146, in a civil action commit him to prison, giving the notice required, &c., and afterwards he is convicted of a crime and confined in the State prison, before judgment is rendered in the civil action, the bail are discharged. See a. 7, s. 4; a. 5, s. 7; a. 8, s. 9. The act of 1817, ch. 146, empowers the bail to arrest and commit the principal, give notice to the creditor, &c. 16 Mass. R. 318—320.

If excessive bail be required, in an action for a tort, the court, on *habeas corpus*, will discharge the deft. on his giving bail in a reasonable sum. Referring all demands in a civil action, discharges the bail. 17 Mass. R. 591 to 606, Bean *v.* Parker & al. 17 Mass. R. 116.

§ 30. On *scire facias* against bail, it is no excuse the principal died, though after the return day of the execution, yet before it was actually filed in the clerk's office. 4 Pick. 120.

§ 31. An action lies for demanding excessive bail, but not against a *judicial* officer. This was an action of trespass on

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the case against a justice of the peace, who, in the case of perjury, required $2000 bail and two sureties. Held, he was, in this, a *judicial* officer, and not liable to a *civil* action if the bail was excessive, but to an indictment or an impeachment; and doubtful if the sum required was excessive. 1 N. H. Rep. 374–378, Evans *v.* Foster.

4 Barn. & Cres. 886.

§ 32. An affidavit to hold to bail, made before a British consul, in a foreign country, must state the sum the deft. is indebted in to the plt. and in what money.

1 Cowen, 99–103, Stewart *v.* Mc Quin.

§ 33. A promise as bail. A is sued in a justice's court: on B's request, the court is adjourned, on his acknowledging himself as bail, for an adjournment 'agreeably to law,' to such a time. This promise is a valid security, though the adjournment be for more than twelve days. The statute prescribed no particular form of security. Held, 1. An adjournment was a sufficient consideration of the promise: 2. And appearing in it took it out of the statute of frauds: 3. *Assumpsit* is the proper action: 4. Nor is it discharged by charging A in execution: 5. Where two are bail, charging one in execution does not discharge the other. A was discharged on the twentyfive dollar act: 6. Held, further the amount recovered against A, was the measure of damages in this action against B. A was defaulted, &c.: 7. Not the case of *principal* and *bail*, but of *principal* and *surety*. Taking the principal discharges bail, but taking the principal does not discharge the surety. 1 Cowen, 246–250, other cases of security for such adjournments; and 255, plt. may waive such security.

Byrne, ex'r. *v.* Morris, 2 Cowen, 472–478.

§ 34. On a return of *cepi corpus*, the plt. may proceed to file common bail, and take judgment, though the sheriff in fact have suffered the deft. to go at large without bail, a return by the sheriff thus, 'I have taken the deft., who remains under my custody, so sick that I cannot have his body before the justices,' &c. is a return of *cepi corpus*, and the words as to sickness surplusage. The English return *languidus* not in use in New York.

16 Mass. R. 198–200, held, a justice of the peace has no power to recognise. One convicted of felony in the supreme judicial court, who before sentence fled into another State, and is brought back, &c. decided on a *scire facias* issued on his recognisance.

Taylor's case, 4 Cowen, 39–63.

§ 35. The supreme court in New York has the same powers in relation to bail as the English king's bench, and may let persons charged with criminal offences to bail in all cases whatever: 2. Upon the return of a *habeas corpus ad subjiciendum*, with the body of the prisoner against whom a coroner's inquest has found an inquisition of murder or man-

slaughter, the court is not concluded by the finding, but will look into the depositions to see whether a crime has been committed, its nature, and strength of proof by which the accusation is supported: 3. Though the crime appear to be but manslaughter, it is not of course to allow bail: 4. If the guilt or innocence of the prisoner appear to be indifferent, he may be bailed: 5. Though the warrant of commitment be defective, the court will not discharge the prisoner finally for that reason, but remand on a special rule: 6. If there be no reasonable doubt of guilt of a prisoner charged with committing a felony, he ought not to be bailed even by the supreme court.

Savage, C. J. said 'whether the prisoner is to be bailed or remanded, rests in the discretion of the court. That discretion is to be guided by the circumstances of the case and a consideration of the authority,' &c. The King v. Marks, 3 East, 157.

§ 11. South Carolina. By act of December 19, 1809, all bail is viewed as special bail, that is, as bail above, *or bail to the action*, and by the common law it is only necessary to issue a *ca. sa.*, and have a return of *non est inventus* in order to proceed against this kind of bail. 2 Nott & Mc Cord; Digest of S. C. Reports, head Bail. And the principal may surrender himself, or be surrendered in discharge of his bail, any time before the return of the *scire feci*, or of the second *nihil*. And 1 Const. R. 313, the act of 1785, enables the plt. to proceed against the bail by *scire facias*, but does not take away the remedy by debt on the bond given by the bail. 1 Nott & Mc Cord, 323–325. Art. 3. Con.

§ 12. In an action on the bail bond against bail, the plt. is not entitled, of course, to recover his entire demand, but only to the extent of his actual damage, and the jury can give nominal damages. The bond was assigned by the sheriff to the plt. Justice Nott dissented. 2 Nott & Mc Cord, 136–138. 1 Nott & Mc Cord, 64, Bryce v. Morton.

§ 13. Whenever the principal is legally taken from the custody of his bail by law, the bail is released: 2. If the debtor in the prison bounds petition for the benefit of the *insolvent debtor's act*, and is proved guilty of fraud in his schedule and remanded to gaol, the bail is discharged, for he has lost the benefit of that act. Also of the prison bounds act. 1 Mc Cord, 373.

§ 14. If the sheriff arrest the deft. and take appearance bail and sheriff makes return that the deft. is compelled to jail, he loses his remedy against the bail on the bail bond: 2. He cannot contradict his return, but must obtain leave of the court to demand it. 2 Rand. 455—465.

§ 1 *con.* On *scire facias* against the sureties on a bail bond, they cannot deny the arrest of the principal; and it is no defence to deny there is no *record* of the deft's. being bail. The Art. 4. Con.

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usual declaration. Eight pleas in bar. Bail bond in the usual form, but executed only by the sureties, not by the principal, and all demands in the action against the principal were referred. The fact appeared in the pleas. This alone discharged the bail. Scores of authorities cited by counsel. 17 Mass. R. 591 to 606, Bean *v.* Parker and French.

And 2 N. H. Rep. 347, a *scire facias* against bail must aver the notice required by statute of the year 1818, and this is the proper remedy against bail. 359. And a deputy sheriff may be bail. 478.

3 Cowen, 354. Special bail cannot object to the amendment of the *ac etiam*.

5 Cowen, 420, 421. The eight days during which special bail may surrender, *ex gratia*, exclude the teste and return day.

Art. 5. Con. 2 Greenl. 382, 385.

§ 15. So a surrender of the principal debtor, to the officer holding the writ of execution against him, is a discharge of the bail bond. A special demurrer must point out the matters that make a plea double. Maine statute, 1821, ch. 62.

Art. 8. Con. 2 Pick. R. 439—442, Chamberlain *v.* Mallard.

§ 10 *con. Assumpsit* by the underkeeper of the jail in Worcester, to recover the expenses of one Parker, a poor debtor, confined in close prison, after execution against Parker in Mallard's favor was returned *non est inventus*, and after *scire facias* against Parker's bail, but before final judgment thereon the bail committed him to jail on the statute 1817, c. 146. Held, Parker was not imprisoned on mesne process, or execution. So the creditor was not liable, under the act of 1821, c. 22, to pay his debtor's board in prison. See N. H. R. 172–174.

§ 37. 18 Johns. R. 335, Lofflin *v.* Fowler. If the principal be convicted of felony, and sentenced to imprisonment in the State prison of another State for a term of years, the bail is discharged. So if committed for life in New York. 1 J. C. 28; 18 Johns. R. 54.

Reed *v.* Gordon & al. 1 Cowen, 50-54.

§ 38. One insolvent discharged is entitled to common bail, &c. Motion to discharge the defts. on common bail. Both had been discharged under 'the act for giving relief in cases of insolvency,' (sess. 36, ch. 98, 1 R. L. 460.) Held, the validity of this discharge could not be questioned on the motion, either on the ground of fraud in getting the discharge, or irregularity, that is, not questioned on *affidavits*, though it well may be on pleadings.

Waterman & al. *v.* Allen & al. 1 Cowen, 60—62.

§ 39. Where bail are excepted to, and neglect to justify in due time, they are as no bail; and the plt. may file common bail and proceed under the statute. He is not bound to accept a plea till the bail have justified, and though he refuses to plead on this ground, he may afterwards file common bail, and enter a default. Statute 1 R. L. 324.

CHAPTER CLI.

DEBT FOR RENT.

§ 7. *Quit rents. Lord Baltimore's case.* Error to the circuit court of Maryland. Debt for rent brought by the plt. in error, to recover certain *quit rents* alleged to be due from the deft. to the plt's. intestate, daughter of Charles, Lord Baltimore. Special verdict found the facts. Held, 1. His title and claim to the quit rents reserved by the proprietary of the late Province of Maryland, was extinguished by the agreement between the heirs, devisees, and personal representatives of the said Lord Baltimore and of his son and heir, Frederic, Lord Baltimore, made in 1780, and confirmed by an act of the British parliament in 1781. This agreement included the *quit rents*, then actually due to her (if at all,) and assigned them to Henry Harford, the devisee of Frederic, Lord Baltimore, entered into in England by her husband and her committee, (she being a lunatic,) and the consideration actually passed to her use, and the whole transaction having been between British subjects, under the direction of the court of chancery, and confirmed, as above, transferred the complete legal and equitable title to the assignee: 2. It seems her husband's *bona fide* assignment, for a valuable consideration of a debt presently due to his wife divested in equity her title to the debt and rents.

11 Wheat. 184-171, Henry Cassell, adm'r. of Louisa Browning v. Charles Carroll of C.

The special verdict found Charles I., June 8, 1633, granted to Calvert, baron of Baltimore, his heirs and assigns forever, in fee simple, the Province (now State) of Maryland, by a charter of the above date. He died in 1675, and left Charles, afterwards Baron of Baltimore, his son and heir, who entered into the said province, and was seised thereof. He, in 1711, granted, according to the laws of the province, to Charles Carroll, Esq., father of the deft., a patent for ten thousand acres, 'to have and to hold the same to him, the said Charles Carroll, his heirs and assigns forever, to be holden of us and our heirs, as of our manor of Baltimore, in free and common socage by fealty, only for all manner of services, yielding and paying therefor, yearly, unto us and our heirs, at our receipt at the city of St Mary's, at the two most usual feasts in the year, *viz.* at the feast of the Annunciation of the blessed Virgin Mary, and St Michael, the archangel, from and after the second day of April, which shall be in the year of our Lord, 1723, the rent of one hundred pounds sterling in gold and silver;' that 'the deft. inherited the said tract of land from

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his father, and is now seised and possessed of the same.' The Lord Baltimore title is traced down through various descents, deeds, entails, and trusts, &c. to the year 1774, rents paid to that time, and so down to the said Louisa. In 1774, the people of Maryland took the government into their own hands, and ousted the officers of the proprietor. No quit rents paid after 1773. The British government allowed said proprietors £80,000 sterling for their losses in Maryland. Settlement as above. The rents sued for accrued between 1771 and 1780.

ART. 3. *Con.* 11 Wheat. 280 —303.

§ 5 *con.* An action for *mesne profits* lies against the landlord in fact, who is in possession of the land by means of his tenants, and by his acts, commands, or cooperation, aids in withholding the possession from the plt. All persons concerned in a trespass are trespassers, and liable.

4 Cowen, 168–173, Jackson v. Loomis.

Trespass for *mesne profits* against a *bona fide* purchaser. He was allowed against the plt. in mitigation of damages, the value of permanent improvements made in good faith, to the extent of the rents and profits claimed by the plt.

ART. 6. *Con.*

§ 1 *con.* The avowant cannot make cognizance as bailiff to his father for rent in arrear due to the father, where the avowant has distrained in his own name and right, though he had power from his father to distrain for the rent due, the distress for rent in arrear must be made in the name of the person to whom due, and cannot be made in the bailiff's name. 4 Har. & McH. 347–348 : cited Ld. Raym. 454 to465 ; 2 Leon. 196 ; 4 Barn. & Cr. 392 ; 4 Har. & McH. 218.

1 Pick. R. 332 —337, Brewer v. Knapp & al.

§ 4. *Holding over, sureties discharged,* &c. Debt for rent. The plt. by indenture leased to the deft. K. a house in Boston for one year, and A. Davis and J. N. Knapp, sureties. K entered and continued to occupy after the year had expired, and after the year he paid money, but did not apply it. Held, 1. The sureties were liable only for the year's rent : 2. That the lessor might apply said money to the rent accrued, after the year, it not appearing whether it was paid before or after rent became due for the second year.

Ch. 110, a. 3, s. 22, rent, &c. how demanded under lease, &c.

Walter v. Dewey, 16 Johns. R. 222.

§ 5. If rent be payable in money or kind, and the lease is silent as to the plea of payment, a tender of the rent on the land by the lessee is not good. He is bound to tender to the lessor in person.

Mc Kinker v. Hawley, 16 Johns. R. 259.

§ 6. Though it seems a mortgagee may distrain for rent due from the mortgagor's tenant on a lease made *before* the mortgage, yet when the mortgagor in possession, *subsequently* to the mortgage, leases the land, the mortgagee cannot distrain or sue for the rent, there being no privity of contract between him and the tenant.

§ 7. Trover for goods the deft. had distrained and sold for rent, he claimed as due to him from the plt. The main question was if the deft. (lessor,) had a right to distrain for the rent, the distress was for three years and eleven months, rent due on a *parol* lease, not void by the statute of frauds. Savage, C. J. stated the law as to rent, &c. in New York thus—'at common law there were three kinds of rent: 1. *Rent service*, so called, because it had a corporal service, incident to it, at least fealty, or the feudal oath of fidelity. Where fealty is due, therefore, with a pecuniary rent, and the landlord has the *reversionary* interest in the demised premises, then the landlord has, by the common law, a right to distrain without any power in the lease: 2. *Rent charge*, is a rent received, where the landlord has no reversionary interest. He would have for such rent no right to distrain, unless the power be contained in the lease: 3. *Rent seck*, is the same as rent charge, except there is no right to distrain reserved. By statute of 4 Geo. 2, ch. 28, right of distress is given in the two last kinds of rent,' [not reenacted in N. York.] He added—'but independent of that statute the right of distraining existed when the landlord was entitled to the reversion and fealty. By our old constitution, such parts of the common law and of the statute law of *England*, and such acts of the colony, as together formed the law of the colony, on the 19th day of April, 1775, are declared to be the law of the State. By our statute concerning tenure, (1 R. L. 7,) all tenures of any estate of inheritance at the common law are declared to be turned into *free and common socage*; and by the common law, fealty is incident to this tenure. In all cases, therefore, where the tenure in this State is not allodial, and where the landlord is entitled to the reversion and to a rent, he is authorized to distrain for such rent without any authority for that purpose in his lease or contract.' 'Then the deft. having the reversionary interest, he had a right to distrain, and the sealed note for the rent was no extinguishment of it;' so judgment for him. The distress not being sufficient for all the rent due, the lessor brought *assumpsit* for *use and occupation* for the residue, and recovered. This was the substance of the case, though many other points were stated by the counsel, and Woodworth, J. and numerous authorities cited, near all English. One point, fealty is not in fact due upon any tenure in this State, (N. York.) It is altogether fictitious. It is retained by statute as to lands holden in *socage*, and abolished as to all grants made directly from the State. (1 R. L. 71, Feb. 20, 1787,) but the right to distrain is not impaired by the statute, but remains. And 1 R. L. 434, April 5, 1813.

Cornell v. Lamb, 2 Cowen, 652—660.

20 John. 407.

§ 8. Replevin. Held, a lessor may distrain on a parol lease, he having the reversion, without any special agreement empowering him to distrain.

2 Cowen, 660-664.

Vol. V. Ch. 151. *Art.* 6. *Con.*

§ 9. Replevin for goods distrained for rent due from Burr. The distress was made after the lease had expired. Burr had moved, and the goods had been carried from the leased premises, so not distrainable at common law, but the distress was made on the 13th section of the act concerning distresses, R. L. 437, allowing a distress of goods *removed* any time within thirty days. Held, 'the remedy thus given is operative during the continuance of the lease only.' Avowry made in form. Stating facts, &c. that the Rector and inhabitants of the Protestant Episcopal Church in the State of N. York, on the 25th day of March, A. D. 1804, were, &c. seised, &c. in fee, and then demised to the deft. Van B. for thirty years, &c. and on —— he leased to Burr for five years, &c. So other facts to make out his right to distrain: 2. Avowry. Demurrer to them for causes assigned: 1. The facts stated did not entitle Van B. to distrain at common law, stated no custom, &c.: 2. Defended the *wrong* and injury, whereas it should be *force* and injury: 3. That it did not appear by the avowries, that the deft. previous to making the distress, complied with the requisitions of the said act. 'During the continuance of the lease only,' expressed by the court probably meant during the continuance of *Burr's possession*, and that had ended before the distress was made. So the act of April 13, 1820, not pleaded, very materially altered the case.

Burr v. Van Buskirk, 3 Cowen, 263—271. p. 264.

Russell v. Doty, sheriff, 4 Cowen, 576—581.

§ 10. Case on the act, 1 R. L. 437, for removing goods in execution, leaving the rent unpaid. Said act provides goods shall not be removed by execution from the demised premises till one year's rent is paid. This act extends to all goods on them, the tenants, or others. The lessor's lien in such case on such goods, is as extensive as his right to distrain, that is, goods he might distrain cannot be removed by execution till a year's rent is paid. Rent may be payable in advance by contract, and he may distrain for it, or have a specific lien against an execution under the statute. One may lease land, though not in actual possession, a clear right of possession is enough, and if A buy at a sheriff's sale, and the debtor remain in possession, the presumption is he is tenant to the purchaser. In fact if one have the right of property, and his right of possession is not disputed, he can lease, convey or devise, when he pleases, though not personally in possession.

Pendleton v. Dyett, 4 Cowen, 581—587.

§ 11. Covenant for rent on a lease for two years; to support the plea of eviction in bar of an action for the rent the tenant must shew an actual expulsion, before, and that it continued till after the rent due: 2. If the landlord bring lewd women so near the premises, who so disturb the tenant and his family, that they leave the premises, still the rent is due: 3. Eviction of the whole, or of any part of the leased premises is a good plea in

bar to an action, either of debt or covenant, for the rent. Held, the evidence offered, as to the prostitutes, &c. was not of a kind to prove the plea, and so properly rejected. It proved no entry on the *leased* premises, no ouster, no physical force, but that the operation was only on '*the moral sense and feeling of the deft.*;' the nuisance might have been abated on the deft's. complaint to the police of the city. Hence he had no moral necessity to leave the house. His leaving it was *voluntary*, not *compulsive*.

§ 12. Debt for the penalty given by said act 1 R. L. 437, 8, s. 14, concerning rent, removing goods, &c., does not lie for removing or concealing goods, not the tenant's property, though liable to be distrained; nor for *advising* to remove the tenant's goods: nor does removing, &c.; a *part* subject to the penalty, for removing all. Tenant being in possession of goods, the law intends they are his, till the real owner proves the contrary. Strong v. Stebbins, 5 Cowen, 210—212.

§ 13. *Goods distrained for rent and trover, brought by mortgagee.* Trover for certain copper stills or kettles, steam tubs, coolers, and a worm. Facts; one Gilmer, a distiller, had mortgaged these articles to the plt., to secure a debt. The plt., as mortgagee, removed them into his possession. Gilmer failing to pay, the articles were placed by Taylor in a stone distillery, held by them under a lease for years, and then possessed by Gilmer for distilling. When the plt's. agent took the articles, they were found affixed to the building; the kettles and boilers being masoned up in brick arches, &c.: he broke up the arches &c. May 15, 1822, within thirty days after said removal, Shuler distrained said articles, as bailiff to the tenant's landlords for $68 74 cts., a balance of rent due Nov. 1, 1821: lease dated Aug, 24, 1820, and for four years. Deft. sold the said articles for the rent, but left them in the plt's. possession. Held, 1. The sale was a conversion, if no right to distrain: 2. The plt's. possession was in mitigation of damages: 3. A mortgagee in possession of chattels, may have trover: 4. The tenant, as between him and his landlord, might, during the term, remove said articles. Many cases examined as to *fixtures:* but the court held, 5. That when they were severed to be removed, they were, for a short time, chattels *separated from the building*, yet lying on the leased premises, so then liable for the rent, and the landlord might pursue them within the thirty days, though so removed by the mortgagee. If so, what is stated in this 5th head, decided the cause: 6. The mortgagee was not the owner so as to prevent the landlord so to follow within the statute 1 R. L. 437: 7. Were distrainable for rent become due before, or within the thirty days after such removal. Reynold v. Shuler, 5 Cowen, 323—331.

§ 14. Terboss *v.* Williams, 5 Cowen, 407, 408, Held, the lessor cannot distrain goods for rent after the term has expired, and

the tenant has removed from the premises, and abandoned the posession, though said thirty days have not expired.

Jackson v. Sheldon, 5 Cowen, 448–457.

§ 15. *Waiver* of tenant's forfeiture. Ejectment lies not for balance of rent being due, &c., after the lessor has distrained, and thereby recovered a part of it, on a clause of reentry on the act as to distresses, rents, and renewal of leases, 1 R. L. 440, s. 23: 2. The act of distraining *waives* the forfeiture: 3. When a forfeiture has accrued on a clause of reentry for rent in arrear, the forfeiture will be waived if the landlord afterwards do any act which amounts to an acknowledgment of a subsisting tenancy: as if he receive rent due at a subsequent quarter, or distrain for that, as to which the forfeiture accrued; 'for after the lease is determined, he cannot distrain for the rent.' 3 Co. Penant's case, 64; Adams on Eject. 160; Co. L. 211, C., 1 Saund, 187 n., 16.

Wright v. Williams, 5 Cowen, 501–506.

§ 16. Replevin. Deft. avowed as *executor* of a lessor, who was seized in fee, for rent due on a lease for years, but which rent accrued after the lessor's death. Held, the deft. should have avowed as *heir:* allowed to amend on paying costs. After the lessor's death the rent belongs to his heir or devisee; and pages 678–687, Warren, &c., plts. in error *v.* Doolittle: in debt on the 14th section of the act 1 R. L. 487, as to rents, &c. Held, it lies against two or more persons jointly, for aiding a tenant to remove goods from the demised premises, the offence being in its nature one, and inseparable: 2. Only one penalty, and that is imposed on all the defts.; not on each and every one of them.

§ 17. Peters *v.* Newkirk, 6 Cowen, 103–108. If any part of the rent be due, it protects the distress for it: 2. Where a lease is surrendered as to part of the premises, the right to distrain continues for the residue. Rent may be payable in advance, and so distrained for when due.

2 D. & E. 600; 4 Cowen, 576; 3 id. 652; 10 Johns. 432.

Hunter v. Le Conte & Ellis, 6 Cowen, 728–782; error.

§ 18. Hunter brought replevin against Le Conte and Ellis, for goods taken in the city of New York. Le Conte avowed, and Ellis, as his bailiff, made cognizance for taking the goods, Feb. 20, 1824, as a distress for $62 50 cts. rent due Feb. 1, 1824, on a demise of premises in the city. Pleas: 1. Affidavit of rent not filed, &c.: 2. A tender, Feb. 18, 1824, of $62 50 cts., which was refused, and no demand afterwards, &c. Held, 1. Though a tender of rent is on the land, yet a personal tender is good off the land: 2. A personal tender before the distress makes it tortious: 3. And such tender, after distraining, and before impounding, makes the detainer unlawful: 4. But a tender after impounding has no effect: 5. If the lessor has incurred any expense before the tender, that expense must, also, be tendered: 6. In replevin, a plea of tender to an avowry or cognizance, need not say *tout temps prist*, nor make a profert of

the money in court: 7. A tender of rent takes away the right to distrain till a subsequent demand and refusal: 8. But a tender does not take away the right to sue for the rent, as a debt; it only saves interest and costs.

§ 19. *Assumpsit* for rent of a ropewalk. Plea a general issue. Held, where one enters, and continues to hold under a demise, without having, by any formal act, renounced his landlord's title, he shall not be allowed to controvert it in an action for rent. The defts. contended, that from Aug. 1, 1824, to May 6, 1825, the title of the land, &c., was in the city of Boston. The facts stated, show the relation of landlord and tenant had existed prior, and up to Aug. 1, 1824, and that then, the plt. gave his consent to the defts. continuing to occupy the premises on their promise to pay rent as they had done; and they did occupy accordingly, for the whole time in dispute, and they paid rent five months, to Jan. 1, 1825, to the plt. There was a promise. Various cases cited by Putnam, J., who delivered the opinion of the court, to show the tenant shall not deny the title of his landlord, &c., in an action for rent, &c.

5 Pick. 124—130, Binney v. Chapman & al.

§ 20. The plt. leased a farm to one Allen, for three years, by indenture of July 1, 1825, containing a provision for paying the rent quarterly. All the produce of the farm, standing or growing, or harvested and collected, if deposited on the estate, should be holden, and be at the disposal of the lessor, in the same manner as if she were in the actual occupation of the farm, and that the lessor might enter to take the same for rent in arrear, accounting for the proceed towards it. Held, that such produce, before any actual delivery of it to the lessor, was liable to be attached by the tenant's creditors. The deft., a deputy sheriff, attached, and the plt. brought replevin. The lessor should have entered and taken possession of the produce, but no rent was due when the attachment was made,—was fraudulent as to creditors.

5 Pick. 522—525, Butterfield v. Baker.

§ 4. The lessor can recover of the lessee, in debt or covenant, all the rent due before the lessor's entry to defeat the lessee's estate under the covenant to reenter: so the devise rent becoming due after the testator's death; but the lessor must, previously to his reentry on the premises, make a demand of the rent, id.

ART. 12. *Con.*

4 Har. & Mc H. 135 to 156.

§ 5. *Reentry without demand, &c.* The lessee contained a proviso that if the rent was in arrear for twentyone days, the lessor might reenter, 'although no legal or formal demand should be made.' Held, the rent having been in arrear twentyone days, an ejectment might be maintained without an actual reentry, and without any demand of the rent. Cited Dormer's case, 5 Co. 40, Goodright *v.* Cator, ch. 178, a. 14, s. 17.

2 Barn. & Cres. 498.

Doe dem. of Harris v. Masters.

§ 3. *Execution on rent—cannot be set off on appraisement, as land is*, though the term be nine hundred and ninetynine years.

ART. 13. *Con.*

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Gay was lessee of a corporation, (Episcopal church in Dedham) under a lease for nine hundred and ninetynine years, paying a yearly rent. The plt. got judgment against the lessors, and levied his execution on the rents growing due from Oct. 1819, to May 1822, appraised by sworn appraisers, and set off by the sheriff, on the statute, as land is. Held, the levy was void: plt. sued for the rent. The court thought the plt. should have levied on a part of the lessor's reversion, and the law would have apportioned the rent: also, that the writ of *elegit*, is not in use in this State, nor does the writ of *levari facias* apply.

17 Mass. R. 439—442, Montague v. Gay.

§ 4. *Distress for rent.* None can be made except where a specific sum is expressly reserved. Things fixed to the freehold cannot be distrained for rent, and so for such a distress, no repievin lies. Vausse *v.* Russell, 2 Mc Cord, 329.

2 Const. Rep. 687.

§ 5. A, one of the heirs and administrators, distrained for rent as administrator, and as agent for them. The tenant replevied. Pending the action A died. Held, the replevin did not abate: that the coheirs by filing a suggestion, might be permitted to come in and defend the suit.

Talvande v. Crips, 2 Mc Cord, 164.

Brackett v. Alvard, 5 Cowen, 18.

§ 6. When the action for rent is founded on privity of contract, it is *transitory*, as between the lessor and lessee; otherwise when on the privity of estate; as where an assignee is a party; and 2 Johns. Cas. 335, Corporation of New York *v.* Dawson.

CHAPTER CLII.

DEBT ON SIMPLE CONTRACTS.

Art. 2. *Con.*

§ 15. Simple contract to sell goods to A. Seller is not bound to deliver till paid. Topping sued Root for not delivering hops to be paid for when delivered. Held, the plt., in such case, must not only aver that he was ready to pay at the time, but he must prove also he was ready. Till the buyer do this, the vendor is not bound to show performance, or a readiness to perform on his part: 2. Where the vendor agreed to deliver to the vendee a certain quantity of hops between October 1 and December 1, to be paid for on delivery, with liberty to the vendee to increase the quantity, (delivery at a certain place,) on giving reasonable notice, held, the vendee was bound to give notice before the first of October, and to prove he was ready to pay for the increase quantity. Held, in an action for not delivering this increased quantity agreed at 13 cents a pound; held, also, the promises were *dependent*. See ch. 118; 10 John. 266, Jones *v.* Gardner; 12 id. 209, Porter *v.* Rose; 7 D. & E. 125; 1 East, 203; 2 Bos. & P. 447; 1 Saund. 320, note (4); 5 John. R. 179; 2 id. 207.

Topping v. Root, 5 Cowen, 404-406.

The above and similar promises, or simple contracts, are often mentioned by judges and counsel, as being *dependent*. They are more properly *concurrent*, because *concurrently* performed. Both at the same time, neither party means to trust the other or give credit; the vendor means when, and at the very time he delivers the goods, to receive payment, and the vendee also means when and at the very time he pays to receive the goods. The principle is the same in covenants, considered somewhat at large in chapter 118, and occasionally in other chapters.

CHAPTER CLIII.

DEBT. USURY.

ART. 4. *Con.* 2 Rand. 109–113.

§ 2. A *tacit* understanding between borrower and lender founded on the known practice of the lender to lend money at legal interest, if the borrower purchase a horse of the lender, at an unreasonable price, is a shift to evade the statute against usury: 2. If the court of chancery doubt whether the sale of the horse or other property, is really meant as such shift, it must direct an issue to be tried on *viva voce* testimony, if to be had.

4 Rand. 415–422.

Usury: in equity. When a party applies to a court of equity for relief against a usurious contract he can only be relieved on payment of principal, *without interest*, under the third section of the Virginia act. The English statute of usury, subjects the usurious lender of money, &c. to the loss of the sum lent. This, as to principal and *legal* interest, the chancellors have considered a penalty, and apply the maxim *nemo tenetur prodere seipsum*, ('when, therefore, a bill in equity calls the deft. to answer as to a *usurious* transaction, unless it waives the penalties of the act and offers to pay the principal and legal interest, the deft. may demur.' The Virginia act varies only as it subjects the lender to lose the legal interest, and to pay the costs of the chancery suit. 'A court of equity has no jurisdiction to enforce penalties.'

1 Greenl. 166–171, Warren v. Crabtree.

§ 5. A lends money on a *usurious* note, when due part is paid and a new note is given for the balance, this is usurious and void: 2. If the borrower be not a party to it, neither maker nor endorser, but the security is such, as to parties and time of payment as had been previously agreed between the borrower and lender, the endorser when sued by the endorsee may show the usury in bar of the action.

10 Wheat. 367–395, De Wolf v. Johnson and others.

Lex loci contractus. Appeal from the circuit court of Kentucky, bill in equity. Held, 1. In the contract for the loan of money the laws of the place where the contract is

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made governs: 2. It is not material that the loan is to be secured by a mortgage on lands in another State, unless there is something in the case to show that the parties had in view the laws of the latter State: 3. Though a contract be usurious in its inception an after agreement may purge it of usury and make it valid: 4. The purchaser of an equity of redemption cannot plead usury to the mortgagee's bill to foreclose; especially if the mortgagor himself has waived the objection: 5. Under a usury law, which does not avoid the securities but only forbids the taking greater interest than six per cent. a year, a court of equity will not refuse its aid to recover the principal: 6. A certificated bankrupt, or insolvent, against whom no relief can be had, is not a necessary party to a suit in equity, but if made a deft. he cannot be examined as a witness in the cause, until an order has been obtained, on motion, for the purpose. The loan was made by De Wolf, $62,000, in Rhode Island; the mortgage was of land in Kentucky; the original loan was in 1815. In 1817 this original contract was waived, by the parties, and a new contract entered into by them, in Kentucky. The laws of Rhode Island did not avoid the contract, but only forfeited one third of the debt, principal, and all the interest, as a penalty to be recovered by information or action of debt. The contract of 1817 was free from usury. Said by the defts. this was a device to avoid the usury of the original loan. The statute of Kentucky of 1798 made the usurious contract void. The loan was to Prentiss, who gave the mortgage, and he conveyed the right to redeem to W. J. Barry, and he to the two Johnsons in possession. Decree for foreclosure. This case involves many important principles, and authorities cited are numerous and to the purpose.

2 N. H. Rep. 333. It is usury to receive more than legal interest for *past* forbearance and the excess may be recovered back in *assumpsit*.

2 N. H. Rep. 42. 410. A contract made usurious in another State cannot be enforced in New Hampshire; but if there be usury in a negotiable note, it cannot be set up against a *bona fide* holder of it, who buys it, without any knowledge of the usury.

3 Barn. & Cres. 273–279, White v. Wright. In this case it appears if the lender of money secures his principal and legal interest at all events, in one contract, and in another makes such an agreement as to stock, as to have his option to resort to the one or the other, and if by the stock contract he can, in any event, get his principal debt and more than legal interest, his loan is usurious. A like case, Barnard *v.* Young, 17 Ves. 44.

2 Pick. R. 145–154, Train v. Collins, adm'r. § 17. *Assumpsit* on a note for $665, made by the intestate, Hyde, to Samuel Learned, and by him endorsed to the

plt. Defence, usury. Evidence of a loan wanted and conversation between the parties, and of a private conference between them, money advanced, security taken, notes of a third person, which were of no value, delivered as a large part of the consideration, the borrower being ignorant, sued, and in distress, and not a dealer in other men's notes. This is evidence to support a verdict on the ground of a usurious loan, though more proper to support one on the ground of fraud. The decision was by a majority of the court. The cases relied on to prove usury are found in this chapter.

§ 18. 8 Wheat. 338–365, Flecknor, in error, *v.* The United States Bank. Held, 1. This and every other bank, not restrained by its charter, may, on discounting notes and bills, lawfully deduct the legal interest from the amount of the note or bill at the time it is discounted: 2. It may so deduct six per cent. interest on notes and bills discounted by it: 3. The statutes of usury of England and of our States expressly provide that usurious contracts shall be void, but without such provision they are not void as against parties who are strangers to the usury: 4. The statute incorporating the bank of the United States does not avoid securities on which usurious interest may have been taken and usury cannot be set up as a defence to a note on which it is taken. It is merely a violation of its charter for which a remedy may be applied by the government: 5. Banks and other commercial corporations may bind themselves by the acts of their authorized officers and agents without the corporate seal: 6. The bank of the United States may discount promissory notes, and may receive a transfer of notes in payment of a debt due to the bank. The United States bank is not subject to State law. To make discounts does, 'from the very force of the terms, include an authority to take the interest in advance.'

§ 19. *Usury or not.* If, on a loan, the lender imposes on the borrower, as a condition, property in part at a price higher than the current price, it is usury; but where goods, or the notes of a bank, or of a third person, constitute part of the loan, and the value of the goods is uncertain, and the borrower, of his own accord, offers to take them at a certain price, or notes made by persons in credit, at par, it seems this loan is not usurious. 19 Johns. R. 496, Stuart *v.* Mechanic Bank.

§ 20. A note, usurious between the maker and payee, is void in the hand of the endorsee. 15 Johns. R. 44–355.

§ 21. A mere change of securities for the same usurious loan to the same party who received the usury, or to one having notice of it, leaves the note void. A note made payable to A, or bearer, but never delivered to A, but passes by the maker to H as a security for a usurious loan, is void in its inception. 20 Johns. R. 285, Tuthill *v.* Davis. p. 288.

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§ 22. The borrower has *assumpsit* to recover the *usurious interest*, having paid the true principal and the legal interest, and those will be intended to have been paid on the lender's silence, and defending on other ground. 20 Johns. R. 290.

§ 23. A, being embarrassed and having a promissory note payable to himself, endorsed and delivered to B, his clerk, with instruction to raise money by the sale of it to the plt.; also to conceal from him that the note was A's property. B sold it to the plt. at a discount of thirtythree and one third per cent. and represented it as B's property, and endorsed it to the plt., without recourse to B, in the event of the failure of others, who were liable on it. The plt. sued A. Held, the transaction was usurious.

Ruffin v. Armstrong, 2 Hawks, 411.

§ 24. A note endorsed for the maker's accommodation, who gets it discounted at illegal interest, is usurious and void in the hands of an innocent endorsee, as against the maker and endorser. Nor is the case varied if the note be a renewal of a former note, if the parties to both be the same. Otherwise, where a third person, innocent of usury in the former note, takes the new note. Flemming *v.* Mulligan, above. Same principle, art. 5, s. 11.

Flemming v. Mulligan, 2 Mc Cord, 173–178.

§ 25. Casting interest on the ground, thirty days are the twelfth part of a year, sixty days the sixth part, &c. is usurious; and it is so, though there is a universal custom among banks to do so, for a usage cannot repeal a statute; so it is usury to pay more than seven per cent. from ignorance of the law but not by mistake of the facts. Another case of usury. Bank of —— *v.* Wager, 2 Cowen, 712–769. Usury to take a quarter of year's interest for ninety days; but not in advance. Days of grace a part of the contract, and interest may be taken for them.

2 Cowen, 678.

2 Cowen, 770–780.

Art. 5. Con.

§ 26. If a stock and exchange broker charge a *commission* of half per cent. in addition to lawful interest on advances made, on a deposit of stocks as a compensation for transacting the business, this is not usury.

Nourse v. Prime, 7 Johns. Ch. R. 69.

§ 27. Nor is two and a half per cent. commissions for doing the business and acting as sureties, usury; being not so intended, but being a usual allowance; Trotter & al. *v.* Curtis, 19 Johns. R. 160; but may be usurious, 16 Johns. R. 367, being a mere cover and usage, cannot control the statute, id. But *it seems* one may legally receive a commission for becoming a surety, id. As to cattle, 5 Cowen, 144–151.

§ 28. A, residing in North Carolina, contracted a debt in New York, with B, living there. Afterwards, A paid to the agent of B, in North Carolina, a part of the debt, and having credit allowed for four months for the balance, interest at seven

per cent. (that of New York,) was calculated on the balance for four months, and added, and for this sum A gave his bond. Held, the bond was not contrary to the usury laws of North Carolina. McQueen *v.* Burns, 1 Hawks, 476.

§ 29. Chancery relieves against the *excess* of interest on the debtor's paying the principal and the legal interest. Taylor *v.* Smith, 2 Hawks, 465.

§ 30. A gave his note for the sum borrowed, and legal interest, and at the same time gave his parol *honorary* promise to pay five per cent. more interest. Held, to be usurious. *Quære*, as there was no extra interest promised to be paid in a legal or moral view, as the extra promise was against law, it was not even *morally* binding. Willard *v.* Reeder, 2 Mc Cord, 369.

§ 31. *Assumpsit* against the second endorser on a note, &c. Held, discounting a note at seven per cent., and taking the interest in advance, is not usury, either in bankers or others: 2. Where a trifling sum is taken in discounting, and not beyond the legal interest, it will be presumed to be by mistake, and not by adopting an erroneous rule of calculation until the latter is shown: 3. Taking beyond the legal interest by mistake is not usury: 4. It seems, otherwise, if the excess arise from voluntarily adopting an erroneous rule of calculation. Same principle as to interest in advance. 15 Johns. R. 162. The N. York Firemen Ins. Co. *v.* Sturges, 2 Cowen, 664–667.

§ 32. The same Company *v.* Ely and Parsons, 2 Cowen, 678–711. As to taking interest in advance, any person may take it in the course of *trade* on *negotiable* contracts and payable at no very distant day. And 2 Cowen, 712–769; 15 Johns. R. 168; 8 Wheat. 838; 2 D. & E. 52; 1 Bos. & P. 143; 3 Cowen, 284–290.

§ 1 *con.* *Assumpsit* on a note of the defts. to the plt. Defts. pleaded that by the contract sued there was reserved more than lawful interest, and tendered their oath. The plt. may reply that such interest is not reserved, and offer to swear to the same, without averring that unlawful interest has not been *taken* or *received*. The statute makes two branches, one *reserved*, &c., the other *taken*, &c. Defts. pleaded the first only; enough for the plt. to answer and cover all that by his replication. *And* should be read *or* in the act. ART. 7. *Con.* 16 Mass. R. 288—289.

Assumpsit on a note, one plea the plt. *had received*, and second plea, *had taken and received*, unlawful interest with a tender of the deft's. oath. On demurrer to these pleas, they were adjudged good. The second section including the oath, avoids the contract if the creditor *reserves* or *receives* on it, unlawful interest. 1 Pick. R. 267–269, Frye *v.* Barker & al.

The oath must be taken in court. 2 Pick. R. 65, Frye *v.* Barker & al. And all the debtors and all the creditors must

Vol. V. Ch. 153. swear. 3 Pick. R. 171–172; see stat. 1825, ch. 143, *s.* 2, and an act of June 20, 1826.

Art. 8. *Con.*

§ 14 *con.* Same principle as in Manning *v.* Wheatland. But Held, an endorser of a note negotiable or not, is a competent witness in a suit between the holder and maker to prove the note was given for an *usurious* consideration; the note was, in fact, negotiable at a bank. The superior court excluded the endorser as a witness—Cause twice argued in the supreme court of appeals, and the first cases cited were Walton *v.* Shelby, and Jordaine *v.* Lashbrook, Bent *v.* Baker. The Virginia court adopted the rule in Jordaine *v.* Lashbrook, and stated so had Connecticut, and Tennessee; but Massachusetts, Pennsylvania, New York, and S. Carolina, that in Walton *v.* Shelby. See ch. 90, a. 10, many cases. 15 Johns. R. 44, same as Manning's case.

3 Pick. R. 184–183, Knight *v.* Putnam; 3 Rand. 316-361, Taylor *v.* Beck.

Art. 9. *Con.*

§ 3. In an action for the penalty for usury, it appeared the contract was made in one county and the money paid in another. Held, the venue ought to be where the usurious interest was received.

3 Barn. & Cres. 700.

CHAPTER CLIV.

PLEAS IN DEBT.

2 N. H. Rep. 193—197.

§ 9. *Applying payment, various rules.* *Assumpsit* on account annexed for $81,11, many items in which, were for spirit sold in small quantities to the deft., and one item was for rent. A general credit was given for $20; plea *non assumpsit*. The deft. was a townsman, plt. an innholder. Under stat. of June 14, 1791, plt. recovers only 20 shillings; as to the rent, there was no certainty as to time or description of estate. Held, 1. The general credit could not be applied, at the trial, exclusively to the payment of the liquor over 20 shillings in value, or to the payment of the rent: 2. When a debtor makes a payment, without direction to what claim it shall be applied,

1 N. H. Laws, 375.

various rules govern the application: 3. If neither debtor or creditor applies the payment, the court, at the trial, if more than one debt exists, directs the payment to be applied to the debt not secured, if one of them be secured. Cited 6 Cran. 8, 10; 1 Mason, 324; 2 Maule and Selw. 18; 5 Taunt. 596: 4. Or to the debt due in the creditor's own right; if one be

12 Mass. R. 321.

in *auter droit*: 5. Or to the debt first incurred, 2 Maule and Selw. 18: 6. Or to the debt which under all the circumstances appears to have been intended by the debtor. 11 Mass. R. 300; 2 Taunt. 596; Bosanquet & al. *v.* Wray & al. 6 Taunt. 597, prefers paying an equitable to a legal debt. 2 Barn. & Ald. 47; Merivale, 572.

CHAPTER CLV.

ACCORD AND SATISFACTION IN DEBT.

§ 17. Where A and B have actions for false imprisonment pending against each other, a mutual agreement to discontinue their respective actions, and an actual agreement and discontinuances accordingly, is a good accord and satisfaction. Foster v. Trull, 12 John. 456.

§ 18. A, indebted to B, gives him his note endorsed by C, as further security for part of the debt; this B accepts in full satisfaction of all demands. This is a valid discharge of the whole debt, and may be pleaded in bar as an accord and satisfaction. Boyd *v.* Hitchcock, 20 John. 76.

CHAPTER CLVI.

PLEA—ACQUITTANCE.

§ 19. If two or more persons are jointly and severally bound in one obligation, an acquittance to one of them does not entirely discharge the others strictly in equity, for equity will not extend the operation of the acquittance or release, beyond the clear meaning of the parties, and the justice of the case, but will construe it to relate to the particular matter intended to be discharged: but 2. At law an acquittance or a release of one such obligor, wholly discharges the rest. It is a rare thing to find an acquittance pleaded in modern cases; still, by law, it may be pleaded where applicable, and therefore all the old law on the subject, is still in force, and may, occasionally, be of use. Kirby *v.* Taylor, 6 John. Ch. R. 262.

CHAPTER CLVII.

DEFEASANCE AND DISCHARGE.

§ 22. A specialty received as a *collateral security* for a simple contract debt, does not discharge or extinguish it. So may be read in *assumpsit* to ascertain the amount originally due. Charlee *v.* Scott, 1 Serg. & R. 294.

§ 23. If a creditor take his debtor's note, endorse it and get it discounted at a bank, and apply the proceeds to the drawer's credit, then the note is protested, and the creditor pays it; this is not such a parting with the note as to extinguish the first debt. 3 Serg. & R. 233.

§ 29. A, on simple contract, owes B for work done at the request of A's wife. This is not discharged by a judgment the plt. obtains for the same debt, in an action against the wife alone. 2 Serg. & R. 275.

CHAPTER CLVIII.

PLEA—DURESS AND PER MINAS.

§ 28. Duress of goods, will, under some circumstances, avoid a contract. Collins *v.* Westbury, 2 Bay, 211.

CHAPTER CLIX.

PLEA—ESCROW.

5 Barn. & Cres. 671—696, Doe dem. Garnons *v.* Knight.

§ 8 *con.* A party to an instrument seals it, and declares in the presence of the witness that he *delivers it as his deed*, but keeps it in his own possession and there is nothing to qualify that, or to show the executing party did not intend it to operate immediately, except his so keeping the deed. Held, it is a valid deed; and a delivery to the party who is to take by the deed, or to any person for his use, is not essential: 2. Delivery to A for the use of B, the grantee or obligee in it, when the grantor or obligor parts with all control over the deed, makes the deed effectual from the moment of such delivery, though A be not the agent of B. In neither of these cases is the deed an escrow; the deed was a mortgage deed; and the real question was, if there was a *delivery* of it.

2 Barn. & Cres. 82–95, Murray, adm'r. *v.* The Earl of Stair.

§ 14. If a deed be delivered as an *escrow* or not, is a jury question, &c. This was an action on a bond, dated November 3, 1813, given to the intestate. Plea, craving oyer of the bond and condition, which was for the payment to W. Murray (the intestate) his executors, &c., of £2000, by William Henry Dalrymple, within six calendar months after the decease of his kinsman John Dalrymple, Earl of Stair. The plea then stated that the bond was November 3, 1813, delivered by the deft. to W. Saunders, the subscribing witness thereto, merely as an *escrow* on the condition that the same should remain in the hands of Saunders until the decease of the said *J. Dalrymple*, Earl of *Stair*, and that then, and then only, the bond should be delivered to the said W. Murray. Second plea that it long so remained in Saunders's hands, and till March 10, 1819, when he, before the death of said J. D., wrongfully delivered the said bond to said W. Murray, &c. Saunders, called as a witness, stated that it was delivered by the obligor as his deed, but that before, and at the time of the execution, it was agreed it should remain in S's. hands till the death of Lord Stair; and till certain notes were given up; and that the bond was given up to him on that condition. Held, it was then a question of fact for the jury, on the whole evidence,

whether the bond was delivered as a deed to take effect from the moment of the delivery, or whether it was delivered on the express condition, that it was not to operate as a deed till the death of Lord Stair, and until the notes were delivered up: 2. It seems it is not essential in order that a deed operate as an *escrow* only, that it should be expressly declared at the time when it was executed, that it was not to operate as a deed until a given event happened: 3. It is not necessary in a declaration on a *post obit* bond, to aver the death of the person on whose death the money secured by the bond was to become payable. Deft. contended the plt. should be nonsuited, and cited Johnson *v.* Baker, 4 B. & A. 440. Verdict for the plt., new trial granted. Jury again found for the plt. (Lord Stair died before this action was commenced.) Two important points were decided in this case: 1. That whether an *escrow* or not, does not depend on any particular words uttered when the instrument is executed, but on all the facts and circumstances of the case, when the intentions of the parties are to be inferred: 2. That whether an *escrow* or not, is a jury question on a view of the whole case.

CHAPTER CLX.

ESTOPPELS.

ART. 1. *Con.*

§ 35. No man can be affected or bound by a judicial decision, but one who is a party or privy to it. 4 Har. & McH. 6–12. Nor can a court of chancery direct a release by, or enjoin persons not parties in the suit. 252, &c.

§ 36. An instrument not under seal cannot be pleaded as an estoppel, and the form of pleading it is to rely on the deed as an estoppel, and to pray judgment the party may be estopped or not be admitted to deny the facts in the deed; not to demand judgment *si actio*.

Davis *v.* Tyler, 18 Johns. R. 490.

And 1 Greenleaf's R. 1–5, Steel *v.* Adams, if A in his deed conveying lands to B, acknowledge he has received the purchase money, A is estopped though he received none.

§ 37. Governments are not subject to imputations of fraud or *estoppel*, nor do their grants imply warranties.

3 Litt. 482.

If an executor give a bond to pay *as executor* out of *the assets* in his hands and issued on this bond, he is *not estopped* to plead a want of assets.

2 Litt. 66.

§ 38. *An estoppel waived.* As in debt on bond, the deft. pleaded the bond was obtained from him, on misrepresentations and false suggestions made by the plt. 'as *per* preamble in

Chew *v.* Moffet, 6 Munf. 120.

Vol. V. Ch. 160. Art. 2. Con.

the said bond.' Appears the plt. replied no fraud, and issue was joined. Held, as the plt. joined issue on the plea, instead of demurring, he waived his right, (if one existed,) of urging an *estoppel*.

§ 6. *Husband estopped to deny his marriage*, &c. as where A levied an execution against him on land of C his wife; afterwards in trespass, q. c. f. against the husband, B, on the issue of soil and freehold in C, A proved a marriage *de facto* between B and C. Held, B was estopped to show, in avoidance of the marriage, that he and C were within the prohibited degrees of kindred.

7 Wheat. 535–554, Bright's heirs v. Rochester.

§ 7. *No estoppel, as between vendor and vendee.* As where James Dunlap, *an alien*, purchased lands in Kentucky, after 1783, and died an alien before Nov. 1794, leaving his brother John his heir; he sold to Hunter and he sold to the deft. Held, he was not *estopped* to deny the Dunlaps had any title. Marshall, C. J. in delivering the opinion of the court, said 'It is very certain these sales do not create a legal estoppel. The deft. has executed no *deed* to prevent him from averring and proving the truth of the case. If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of *estoppel* that he is bound. It is because, by receiving a conveyance of a title, which is deduced from Dunlap, the moral policy of the law will not permit him to contest the title.' He then states the estoppel as to a lessee in the usual manner, and said—'the title of the lessee is, in fact, the title of the lessor.' (See ch. 131, a. 1, s. 14.) 'He comes in by virtue of it, holds by virtue of it, and rests upon it, to maintain and justify his possession. He professes to have no independent right in himself.' Many reasons added. The Chief Justice then denied the propriety of applying the doctrine between lessor and lessee, to vendor and vendee. He adds—'the vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continued interest in the maintenance of his title,' &c. stating further reasons; admits some State authorities seem to be different; on the whole he does not leave what he calls '*the moral policy of the law*' clearly defined or settled, though his reasoning is in his usual able manner.

2 N. H. Rep. 190–193, Burrill v. West, Jr.

§ 8. *Estoppel by judgment.* The plt. as a constable, sells a horse on an execution in favor of the deft. against W. West, the deft. promised to save the plt. harmless. The plt. brings *assumpsit* on the promise against the deft., which was to save the plt. harmless against all persons having a better claim to the horse than W. West. Joshua Ames sued the plt. for the horse, and recovered judgment and payment. Of this action the deft.

West, Jr. had no notice; the plt. relied wholly on this judgment; judgment against him; but had West, Jr. been notified of Ames's action, he had been estopped.

§ 9. One who for frandulent purposes represents his own property to belong to another, *is estopped* from claiming from those who have purchased the property on the faith of such representations, though he contradicted them before the purchaser acquired a title.

Wells v. Higgins, 1 Litt. 300; and 1 Litt. 11.

§ 10. An award good in part, bars dower by way of *estoppel*. Dower, *unde nihil habet*. The tenants pleaded that the demandant's son, having conveyed the premises to the tenants, with warranty, &c. she and her son, by writing sealed, reciting the facts, and that she had agreed with her son to take a certain annual sum in lieu of dower, referred it to three arbitrators to determine the amount and the security of payment, and she covenanted that on the award being fulfilled, she would release her dower to her son, and his performance was guarantied by one of the tenants; that the arbitrators awarded a sum payable, quarterly, by the son, or the tenants, or either of them and that the son should pay the costs of the controversy; that a certain sum of money vested in the tenant's hands for their indemnity, should be the security, and that all suits, quarrels, &c. touching the premises, should cease, &c. and that in default of fulfilling the award, the demandant might enter, &c. The plea then averred that the costs had been tendered; that the quarterly sum had been paid to and accepted by the demandant up to the time of her sueing, and that the award was in all respects performed on the part of the son and tenants.

Cox, widow, Demandant, v. Jagger and Belknap, tenants, 2 Cowen, 628.

Held, 1. This award was a bar to the action by way of *estoppel*, and not as passing her title: 2. That it was not necessary a release be awarded, so not necessary it be given: 3. That though the arbitrators might have misjudged as to the security, and fixed on one not sufficient, this would not affect the award, their determination being conclusive: 4. That though the award was void, so far as it provided for payment by the tenants, and though it might be void in awarding costs provided for by the submission, yet this would not affect the whole, and it should stand and be enforced for the residue: 5. Where the parties have power to transfer real estate, arbitrators may award they shall do it: 6. An award may be good in part and void in part. Where the void part is not so connected with the rest as to affect the justice of the case, it is void only *pro tanto*: 7. An award that all suits touching the premises shall cease, is equivalent to a release: 8. The material part on award does not transfer a title, but a party to it, is concluded by his own agreement from disputing the title. It operates as an *estoppel*.

CHAPTER CLXI.

LIMITATIONS.

§ 10 *con.* It is sufficient the witness write his name meaning to attest it, though no words be written over his name, expressing the intent, 16 Mass. R. 290, ch. 20, a. 6, s. 8, extends not to the endorsee, &c. same. 4 Pick. 382—385, and the principal's promise or acknowledgment within six years is good against the surety. If the holder neglect to sue the principal on the surety's request, he is not discharged thereby.

§ 13 *con.* When they notify as directed in this act, they cannot waive the bar thence arising, as they can the general act of limitations: as to that, a new promise by them within six years takes the case out of it, and an administrator *de bonis non*, may so promise, &c.

16 Mass. R. 429—433. Emerson v. Thompson & al.

16 Mass. R. 65—70. The application of the acts of limitation to actions, by holders of bank notes against the directors, by whose misconduct the bank fails—Directors must be sued in six years next after guilty of it: the act may not apply to the holders of bank notes.

1 Greenl. 156–158, Heard v. Meader, administrator *de bonis non*. In an action against him, on a promise made by the intestate, it is a good plea in bar, that four years since the original taking out of letters of administration elapsed during the life of the former administrator. Mass. stat. 1791, ch, 28, Maine act, ch. 52, s. 26.

16 Mass. R. 456, 457. § 19 *con.* If a sheriff makes an insufficient return on the writ, by reason whereof the judgment is reversed, the act begins to run from the return.

2 Rand. 303—313, Jone's adm'r. v. Hook's adm'r. § 25. *Another State.* Act of limitation where the contract is sued, applies not where it was made; the act affecting the remedy, not the right. *Quere*, if the act of either State applies. By the statute of North Carolina, actions of debt, on simple contract, must be brought within three years after the cause of action accrued. Not pleadable in Virginia to action brought there on a North Carolina judgment. See ch. 1, a. 7, s. 29, ch. 161, a. 13, s. 5; 13 East. 429; 3 Johns. R. 265; 5 do. 132.

§ 26. This act is construed in equity as it is at law, and so is a good bar: Kane v. Bloodgood, 7 Johns. Ch. R. 90–127; Murry v. Coster, on appeal, 20 Johns. R. 576: and when the act begins to run, it continues to run without interruption by any event.

Moires v. White, 6 Johns. Ch. R. 360.

Roosvill v. Mark, 6 Johns. Ch. R. 266. § 27. *Acknowledgment, payment, &c., in equity*, operates as at law: the acknowledgment must be of a present existing debt, unqualified, and made by the party himself. Any payment or

act of his trustees or assignees, no parties to the contract, or obliged to pay, or contribute, is not a good constructive acknowledgment of the original debt. A devise of real and personal estate to pay all debts, does not revive a debt barred by the act, id. An admission by an executor or administrator, will not bind the *real* assets in the heir's hands, or devisee's, or people's, by escheat. 6 Johns. Ch. R. 360.

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§ 3. *Assumpsit;* plea, the statute. Held, if the deft. say he does not owe the plt. anything, but if A, (the surveyor of the timber) will say the deft. had the timber, or if the plt. will prove it by A, he, the deft., will pay for it, if he cannot show he had paid for it. No evidence produced A was dead, or that he had been applied to, or said anything. Held, this case is within the act, the condition not being complied with, &c. Same case 3 Pick. R. 4. 1 Pick. R. 368—371, Robbins v. Otis.

ART. 2. *Con.*

§ 4. To take the case out of the act, the acknowledgment must admit that the debt continues due at the time of the acknowledgment. If this be accompanied with circumstances or declarations, showing an intention to insist on the benefit of the statute, no promise to pay can be implied. The rule is, 'that the case is taken out of the statute if the deft. has within six years, made an unqualified acknowledgment of an existing debt, or if he has made a conditional promise, and the condition has been performed.' 2 Pick. R. 368—380, Bangs v. Hall.

§ 5. 4 Pick. 110, 113, Whitney, *v.* Bigelow, held, the acknowledgment to take the case out of the statute may be inferred from facts without words: 2. A general acknowledgment of being indebted to the plt. is sufficient, *prima facie:* 3. Even to a stranger, in the plt's. absence: but 4. A mere endorsement made on a note by the plt. himself, without the deft's. knowledge, or proof of the payment of the sum endorsed, will not take the demand out of the statute.

§ 6. To take a case out of the statute, the acknowledgment of the debt must be unqualified and unconditional: as if the deft. say to a witness, he shall be ready to deliver the powder (thing promised) whenever the plt. shall settle a certain suit named: held, not to be 'an *unqualified and unconditional* acknowledgment, that the original debt was justly demandable.' The deft. 'did not mean to give validity to the plaintiff's claim, but on condition that his own should be allowed.' But said, words evincing a willingness to waive the statute, without acknowledging the existence of the debt, are evidence of a new promise. The maker of the note when presented to him, said he did not recollect giving the note, but if he 'did he would pay it, its being outlawed should make no odds.' 11 Wheat. 309—319. pp. 316 to 319, valuable notes; 2 N. H. Rep. 425. Stanton v. Stanton.

§ 7. By the words 'beyond sea,' in the saving clause of limitations of South Carolina, is meant, out of the State: so in 2 Mc Cord, 331.

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Georgia; ch. 179, a. 19, s. 33: same in Tennessee, id. 3 Pick. 291, as to one of several acknowledging.

§ 8. *Assumpsit* on a note made May 19, 1814, by the deft. and A, whom the deft. survived, payable on demand. Deft. pleaded the general issue, and statute of limitations. The plt. replied, that the action accrued within six years before the commencement of the action, and issue joined. Plt's. evidence; the makers delivered goods to the plt. to be sold, and the proceeds to be applied towards paying the note, and some were not sold till near six years after the delivery, (A. D. 1815) when the value of the goods had fallen. Held, 1. The plt., as factor, was negligent in selling, &c.: 2. If such sale be made in a reasonable time and proceeds endorsed, it is viewed as a payment as to said statute, made by the maker's order; otherwise if the sale be after a reasonable time, and no notice to the maker or order from him, &c.

5 Pick. 54-58, Porter v. Blood.

ART. 6. *Con.*

§ 1 *con.* This act of Feb. 1794, does not extend to cases of slander, or actions for torts. 2 Pick. R. 605, Cook v. Darling.

ART. 9. *Con.*

§ 3. *Assumpsit* on a note made in 1814, by Foster and Mary Norris *dum sola*, payable on demand. The plt. laid the promise as made by Foster and said Mary, while sole. Defts. pleaded the statute of limitations and issue thereon joined. Held, an acknowledgment of the note by Foster within six years, but after the intermarriage of Norris and said Mary, was not evidence to prove the issue. Foster's acknowledgment was deemed the new promise of him and said Mary, within six years; but as she had been a wife more than six years, she could not have promised within that time. See a. 6, s. 3, Green v. Crane; and Ward v. Hunter, 6 Taunt. 210. In this last case said, when the courts hold, 'that an acknowledgment is evidence of *a new promise*, then made, it must be of a promise made by a person competent to make it, and to a person in existence to receive it. Plt. nonsuited. A lessee, O, paid the lessor too much rent: when mentioned to him, he said if there was any mistake it should be rectified. Held, this obviated the statute of limitations, as to payment made by the other tenants, as well as by O. A wife cannot renew a promise.

1 Barn. & Cres, 248, Pettam v. Foster and Norris and his wife.

2 Barn. & Cres. 149-157, Clark, adm'r. v. Vaughan.

2 Mc Cord, 5; 18 Johns. 288. Martin v. Williams, 17 Johns. R. 330.

§ 11 *con.* *Assumpsit* above six years after the cause of action accrued, not necessary to state a new promise within six years. Proof of an acknowledgment of the debt within six years, supports the plt's. action: 2. So if the deft. offer to *set off* a demand against the plt., which accrued above six years before suing, it is not necessary the deft., in his *notice* annexed to his plea, should state a promise to pay within six years: 3. Nor is it an objection that the demand offered to be set off, was not originally due to the deft, but had been assigned to him: the assignment being before the commencement of the action.

Sands *v.* Gelston, 15 Johns. R. 511. Deft. admits he received the money, but denies the validity of the claim, deft. is not liable.

This was an action on the case for fraud, in the nature of a conspiracy, as to insurance. Special declaration stating facts. Plea the statute. The plt. replied he did not discover the fraud till within six years before the commencement of the suit. Defts. demurred specially for causes stated. Held, the plt. might reply thus, generally; but a judgment recovered by the deft., on the policy, was a bar to this action till reversed. 1 Pick. R. 435–442, Homer v. Fisher & al.

§ 4. 5 Pick. R. 74–80, Welles ex'r. *v.* Fish & al., the same principle; and 2 Mc Cord, 426; 6 Pick. 74.

§ 5. The statute runs as usual, if the deft. be guilty of no fraud, though the parties first learn the right of action accrued within six years before the action commenced. 3 Greenl. 405, Bishop v. Little.

§ 6. But the act is a bar in trover commenced more than six years after the conversion, though the plt. did not know of the conversion until within that period; the deft. not having practised any fraud to prevent the plt. from attaining that knowledge at an earlier date: 2. Held, the deft. might show when the plt's. declaration was actually filed. 5 Barn. & Cres. 149.

§ 7. If an attorney act negligently in getting mortgage security for A, the six years commence from the time of the negligent act, and not from the time A discovers the insufficiency of the security. 5 Barn. & Cres. 259.

§ 8. *Assumpsit* for negligence, want of skill, and fraud in doing work. Plea, the statute in bar. Held, the plt. cannot reply fraudulent concealment of the defects in the work by the deft., so that the plt. did not discover the fraud until six years before the commencement of the action: the deft. cannot be deprived of the benefit of the act in such case. *Quere*, if this be not contrary to Field's case, in this article; 20 Johns. R. 277; the same principle as p. 33, 5 Johns. Ch. R. 522; 7 do. 30. Troup *v.* Smith's ex'rs., 20 Johns. R. 33.

§ 9. The deft., the notary of the bank, neglected to notify endorsers on a note in the bank, to be collected, whereby A was sued and had to pay damages. The bank then sued the notary, the deft., but *after* six years from the time of the neglect. Judgment for him, though the bank was sued and had to pay damages *within* six years. Utica Bank *v.* Childs, 6 Cowen, 238–242.

§ 8. After twenty years a mortgage is to be presumed to be satisfied; the mortgagor all the time having possession, no interest paid on demand; no acknowledgment: 2. Where a debt is claimed by the plt. and disputed by the deft., admitting he has not paid it; lapse of time cannot raise a presumption of payment, but may afford a presumption against the original existence of the debt. *Art.* 11. *Con.* 2 Jacob & W. 228—235, Christophier *v.* Sharpe.

§ 9. *Entry on land.* A party having a right to land, has, in

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every event, twenty years to enter, and ten years after legal disability, existing when the right accrued, is removed, he may sue. Jackson *v.* Coles, 20 Johns. R. 301.

§ 10. The lapse of twenty years raises a presumption of payment of a judgment as well as of a bond. 2 Const. Rep. 617.

§ 11. It seems the *law* courts in New York, North Carolina, and Virginia, have decided differently from Field's case, leaving such matters to the courts of equity. See 20 Johns. above, 2 Murphey, 115; 2 Munf. 115. It seems there is clearly a difference, in this respect, between those States which have a separate general equity jurisdiction, and those that have not; and in those States in which there is no separate court of equity, it is natural and reasonable the law courts should go further in detecting fraud, than in those States in which there are such separate courts.

Art. 12. *Con.*

2 Nott. & Mc Cord, 160 -167.

After twenty years, a bond is presumed to be paid, unless such presumption be rebutted; and it is not rebutted by the confession of one obligor that he had not paid it, and he believed the others had not. If two obligors give a bond to three obligees, and one of them give a bond of indemnity to the obligors, the one is barred his action, so all, especially if he acknowledge he has received the value, presumption may be rebutted.

1 Mc Cord, 145.

In this State, South Carolina, limitation as to personal actions, is four years; but executors and administrators, four years and nine months. 2 Bay. 194–481; promise by one executor revives, &c.; 2 Com. R. 178, 208, 269, 441; 1 Nott. & Mc Cord, 109, 110; once began to run, no after disability can stop it; 1 Nott. & Mc Cord, 296–312; as to executors and administrators; 2 Nott. & Mc Cord, 259–261; and statute of 1789.

1 Rand. 284–287.

The act is a good plea to a suit in equity, brought to recover money collected by an attorney, for the plt., and not accounted for by him.

Art. 13. *Con.*

5 Pick. 321, Hemenway *v.* Gates.

§ 2 *con.* Where an administrator dies within four years, &c. and administration *de bonis non* is granted. The creditors are not barred till after the expiration of four years from the last grant of administration: 2. The *cestui que trust* sues the trustee; held, the general act of limitation does not apply to trust estates. Decision April term, 1828.

§ 5. 1 Mason, 151–180, Le Roy *v.* Crowningshield. The same principle, and numerous cases well examined.

2 Mason, 319, U. States *v.* Hoar, Jr. adm. in error.

Held, that no *State* statute of limitations bars the U. States, but in virtue of some federal statute, not the 34th section in the judicial act of Congress of 24th Sept. 1789. Court cited *quod nullum tempus occurrit regi;* also, 4 Mass. R. 528, &c. The plea of *plene administravit* examined.

In New York. The people not being named in the acts of limitations, are not bound by them; hence may sue a personal action at any time. The people *v.* Gilbert, 18 Johns. R. 227, nor is the case within the acts in which half of the penalty is to the people and half to the party aggrieved. Wilcox, q. t. *v.* Fitch, 20 Johns. R. 472. VOL. V. CH. 161. *Art.* 13. *Con.*

§ 32. Very late cases; establishing the true principle, that is, that there must be a *new promise* expressed or clearly implied, to take the case out of the Statute. Principles in this and other cases cited below, are, 1. A debt barred by the statute of limitations may be revived, (and recovered,) by a *new promise expressed or implied*: 2. An *implied* one may be created by the fact of a positive and unqualified admission of the debt: 3. No *implied* promise exists if the debtor's acknowledgment is attended by any circumstances or expressions which repel the idea of an intention or readiness to pay the debt. In short the evidence must prove the deft. acknowledges he owes the debt, is willing and intends to pay, the statute having barred the action on the original bond that has ceased forever to be any ground of action, there to give existence to an action in the case, there must be such a promise as is an entire new ground of action where there remains a moral obligation to pay. Bailey *v.* Bailey, 14 Serg. & R. 195, 5 Conn. R. 480; 7 John. R. 90; 15 John. 511, cited above; 2 Pick. 368, &c.; 1 Barn. & Cres. 248; 6 Taunt. 210; 3 Greenl. R. 97; these six last cases and many others, all cited above. Act of Parliament, May 9, 1828, requires the promise to renew to be in writing, and signed by the party to be charged. ART. 16. *Con.* 1 Peters. R. 351, Bell *v.* Morrisson, Jan. 1828.

CHAPTER CLXII.

NIL DEBET, &c.

§ 2. Where in debt issue joined on *non est factum*, or an indemnifying bond, and is found for the plt., yet judgment may be for the deft. as if from the other pleadings it appears the condition of the bond has been fulfilled. If a replication to a general plea of performance omits to assign any particular breach, it is bad on special demurrer. ART. 2. *Con.* 2 N. H. Rep. 126. Cheshire Bank *v.* Robinson.

§ 3. The plea of *non est factum* is a plea to the merits, and ought to be received after issue made up on the plea of payment, on the delay of filing being sufficiently accounted for. 4 Rand. 448–450.

§ 4. On a plea of *non est factum*, where it was proved a son of the plt. had said he could counterfeit the hand of the deft. Held, evidence might be given to shew the *infamy* of the son's character, circumstances existing to render the execution Rowt *v.* Kile, Gilmer, 202. 6 Munf. 462.

Vol. V. Ch. 162. Art. 2. Con.

of the instrument doubtful. Though there be previously a plea of payment, generally the plea of *non est factum* ought to be received: 2. The addition of the words 'to the best of his knowledge and belief,' to an affidavit annexed to a plea of *non est factum*, does not vitiate the plea.

§ 5. If to debt on bond the deft. pleads *non est factum*, he cannot prove failure of consideration, at least without notice of such matter. So if he pleads *non est factum* to an arbitration bond, the amount of damages is not in issue. So *non est factum*, the deft. cannot show the bond was not taken according to the statute, but must plead it specially.

2 Nott & Mc Cord, 492. 1 Nott & Mc Cord, 554.

§ 6. The plea of *non est factum* ought to conclude to the country, but if it do not, it is not error when the plt. does not file either replication or rejoinder.

Porter v. Martin, 1 Litt. 158.

CHAPTER CLXIII.

NUL TIEL RECORD.

§ 23. The declaration was in debt on judgment. The pleas *nul tiel record* and *payment*. The plt. replied '*there is no such record*,' &c. but omitted the usual conclusion, *et hoc paratus est verificare per recordum*, &c. The plea of payment then was a replication, taking issue on the payment; and there was one general conclusion at the end of both replications, as if they had been one, thus, 'all of which the said Hawley prays may be inquired of by the country.' The replications were served on the agent of the deft's. attorney, June 7, 1823, and the plt's. attorney considering the cause thereby at issue, endorsed thereon a notice of inquest for the 7th of July, 1823, which was served with the replication on the day for which the inquest was noticed, but not till after it was taken and the verdict recorded. A special demurrer to the first replication was served on the plt's. attorney, with a *similiter* to the second replication. The causes of demurrer assigned, were, 1. The want of the usual *verification et hoc*, &c., and, 2. That there was no prayer of judgment on these facts. Bradish moved to set aside the inquest for irregularity. Baldwin *contra* insisted that the demurrer was frivolous. The court granted the motion, and the inquest was set aside. Held, the said omission was cause of special demurrer; that it, therefore, was proper. That the party had a right to demurrer, and that being served within the twenty days limited by a rule of the court, after the receipt of the replication, (or forty days if the replication be served on an agent,) will prevent inquest, or be good cause for setting it aside, whether taken before or after the service of the demurrer. See ch. 180, a. 6, s. 4.

Hawley v. Hanchett, 1 Cowen, 152—154.

CHAPTER CLXIV.

OYER.

§ 40. The court said, 'we take the law to be, that *oyer* is not demandable of a record; nor in an action on a bond for performance of covenants in another deed, can oyer of such deed be craved, but the deft. and not the plt. must show it, or the counterpart, with a profert of it or an excuse for the omission.' See Chitty's Plead. 302, third Am. Ed. 8 Wheat. 690-697, Sneed v. Wesler.

§ 41. In the oyer the words were, 'or delay,' in the declaration were 'or other delay.' Variation is small and not material. Henry *v.* Brown, 19 Johns. R. 49.

§ 42. When there is oyer of a deed in the declaration, it becomes a part of the declaration; as where in covenant the deft. craved oyer of the deed, set it out, and pleads *non est factum*, the deed so set out becomes a part of the declaration, and the only question at the trial, on the issue, was whether the deed set out was executed by the deft. 4 Barn. & Cres. 741. Snell v. Snell.

CHAPTER CLXV.

PLEA—PAYMENT.

ART. 2. *Con.*

§ 6. *As to place.* If there be a promise in writing to deliver *specific articles* at a day certain, and no place named in the note, the creditor has his election, the right to appoint the place: 2. If a promise be in the alternative to deliver one article at one place, and another at another place, at the debtor's election, it seems he ought to give the creditor reasonable notice of his election: 3. A plea of tender of specific articles must state they were kept ready until the uttermost convenient time of the day of payment. It may be added the creditor ought to give reasonable notice of the *place appointed*, when the election is his. Plea in bar bad mainly as to the *uttermost* time. See Tender, ch. 170. 1 Greenl. 120-124, Aldrich v. Albree & al.

ART. 3. *Con.*

§ 7. *Assumpsit* to recover $6500, the difference on exchange of vessels. Plts. stated the exchange in their declaration and also that the defts. agreed to pay said sum boot money. Evidence, the agreement was to pay it in notes at three, six, and nine months. Held, no variance, the action being brought *after* the notes fell due. The notes were given. Held, 2. The defts. were liable, there being no agreement these notes should be received *in payment* and discharge of the defts., though given by the agents of the defts., and one of them had funds sufficient to pay them when they fell due Porter & al. v. Talcott & al. 1 Cowen, 359-386.

Vol. V. Ch. 165. *Art.* 3. *Con.*

and became insolvent: 3. Where an agent buys goods for his principal, and gives his own notes, they are as the principal's himself, so far as the question, *if payment or not*, is concerned: 4. Generally the note of the buyer given at the time of the sale, is no payment, unless there be an express agreement to receive it *as payment*, so as to his agent's note: 5. The principle is the same whether it be given for a precedent or cotemporary debt, or whether the note of the party, or of a third person: 6. Any such note being *payment* or not depends entirely on the fact, whether agreed by the parties expressly to be payment or not; so as to the above and the other cases. Said questions, &c. were made by the deft's. counsel. Was a special verdict finding the facts in substance. The power to the agents and exchange were by *parol*. Many authorities cited by the counsel and the court, English and American. As to the count for goods sold and delivered, the court thought it sufficient. See Brooks *v.* White, ch. 36, s. 17, &c. Woodworth J. observed, the special contract was in part an exchange, and in part a sale, while open, the action must be on it, but as to the *exchange* part, it had been executed and so far at an end. As to the *sale* part, he saw no legal difficulty in declaring for a sale. Cited 2 Chitty, 85; Kelly *v.* Foster, 2 Binn. 4; Bul. N. P. 139, Brooks *v.* White, &c.; Gordon *v.* Martin, ch. 36, s. 20; Alcorn *v.* Westbrook, ch. 177, a. 9, s. 56; Mussen *v.* Price, ch. 36, s. 16. Woodworth, J. thought the count on the special agreement substantially correct; for all had been performed but the payment of the money become due, and enough to state, generally, a sale and non payment. Again referred to Brooks *v.* White, and to Clark *v.* Gray & als. ch. 23, a. 6, s. 3; ch. 175, a. 6, s. 33, 34. As to the note's being no payment. See Johnson *v.* Weed, &c. and other cases, ch. 20, a. 19, s. 4.

CHAPTER CLXVI.

MATTERS OF RECORD AND BAR.

Art. 3. *Con.*

§ 5. 2 N. H. Rep. 322. If no *ad damnum* be inserted in a writ, and the jurisdiction of the court depends on the amount of the damage demanded, the defect cannot be amended. See 1 Har. & Mc H. 159.

Art. 4. *Con.* 1 Cowen, 670-687.

§ 7. In debt on bond, *variance* between the bond and oyer cannot be objected to on trial, but the deft. ought to demur. In debt on a town collector's bond, the plt., in assigning breaches, stated the tax warrant, and averred the collector

thereby was required to pay 'a large sum, to wit, $5935.59, to the county treasurer; but the warrant produced required the payment of $4530.15.' Held, no material variance: 2. When an averment is material, adding a *videlicet* does not make it immaterial, but the want of a *videlicet* will sometimes make an averment material, which would otherwise not be so: 3. To a declaration, in debt, on a bond setting out the condition and breach, *nil debet* is not a good plea, but if pleaded, and not demurred to, it puts in issue every material fact in the declaration: 4. The court will not allow a formal objection to defeat an action, but will suffer the party to amend in any stage of the cause: 5. The collector is liable on his bond, though the county treasurer has paid to the State the amount due from him: 6. A supervisor of a town, in performing his duties, as such, acts in his official capacity; and is *pro tanto* a corporation; may sue and be sued, as far as his trust is concerned. His right so to sue passes to his successor, and he, under the act, 2 R. L. 126, may sue in his own name.

VOL. V. CH. 166. *Art.* 4. *Con.*

Jansen, supervisor of Kingston v. Ostrander.

§ 11. On error to the common pleas. Held, 1. The judgment of concurrent jurisdiction, directly on a point, is conclusive between the same parties, on the same matter, coming directly in question in another suit: 2. And this whether pleaded or given in evidence under the general issue: 3. It is conclusive, whether it appear upon the face of the record, in the former suit, that the same matter was tried and passed upon or not: 4. If it was, in fact, so tried, without this fact appearing on the record, the proper course is to give the record in evidence, and then prove, by parol, that the matter did arise, and was tried on the pleadings, in the record: 5. As where B sued G on a promissory note, in the marine court, and G pleaded the general issue, with notice the note was given on the fraudulent sale of a vessel by B to G, which was the question on the trial, and the verdict was for the deft.; and afterwards B sued G, in the common pleas, on another note given on the same purchase. Held, that on the trial of the second cause, the record and proceedings in the first were conclusive evidence of the fraud; and were a conclusive bar to the second action; that the proper course was to give the record of the marine court in evidence, and then to show by *parol* evidence (by the justice who tried the first cause) that the same question had been tried before him. The fraud was in B's sale of a vessel to G and others utterly unseaworthy and falsely representing her to be a good vessel, knowing her bad condition.

ART. 5. *Con.*

Gardner v. Bushbee, 3 Cowen, 120–128.

§ 5 *con.* Former recovery pleaded. Is not in evidence on the general issue, in assault and battery. Plea, was not

ART. 6. *Con.*

Vol. V. Ch. 166. Art. 6. Con.

guilty, with notice of *son assault demesne* and *molliter manus imposuit*, in defence of the deft's. possession. Cole *v.* Carter, 4 Cowen, 681—683. Is in evidence in *non assumpsit*. 3 Cowen, 120; 4 Cowen, 559. Not in trespass. 3 Burr. 1353, Bird *v.* Randall; 1 Chit. Pl. 472, 475, 496; 10 John. 111–246; 12 id. 455; 14 id. 511.

CHAPTER CLXVII.

RELEASE.

Art. 2. Con.

§ 11. Possession on which it operates. A lets salt marsh to B. He mows it and takes away the hay; and soon after takes a release of the land, it is valid. 5 Pick. 423, Thatcher *v.* Cobb.

Art. 8. Con. Jackson *v.* Stackhouse, 1 Cowen, 122–127.

§ 6. Bond and mortgage. Among other things, held, 1. A release without consideration, and not under seal, is void: 2. If under seal, it would have been construed a covenant not to sue, and operate as a release, to avoid circuity of action: 3. A release of the debt discharges the mortgage also: 4. Where there are only general words in a release, they are construed most strongly against the releasor; but if there be a particular recital, and then general words follow, these are qualified by the recital: 5. Where a release acknowledged the receipt of $1, in full, of a certain judgment, describing it, and also in full of all debts, demands, judgments, executions, and accounts whatsoever, held, it was restrained by the particular words, to the judgment only, and did not operate on a mortgage between the parties.

CHAPTER CLXVIII.

DEBT. PLEA—SET-OFF.

Art. 1. Con. 4 Rand. 359–365.

§ 7 *con.* Joint and separate demands cannot be set off against each other, nor can partnership and separate demands be set off. The note sued was made to Adams, *one* person: the *joint* note of Jenkins and Adams could not be set off.

Root *v.* Taylor, 20 Johns. R. 137.

If an administrator sue for a debt due to his intestate, the deft. cannot offset one due from the intestate, and bought up by the deft. *after* the death of the intestate: can be only with the plt. in the action. 1 Cowen, 683, 685.

1 Mason, 93.

§ 10. The plt. sues for damages for the deft's. negligence, in keeping the plt's. sheep, founded on the breach of a special contract. Deft. cannot set off his claims for keeping them. They are the subject of a distinct action.

§ 11. *Set off against a mortgage, &c.* Williams held a mortgage against Caryl and Storrs, and became indebted to them in $3000, on an open account, after which the complainants recovered a judgment against said C. and S. W. subsequently assigned the mortgage to said bank, without endorsing said $3000. The complainants tendered to the bank the amount supposed to be due and more, and now filed their bill for redemption and assignment to them for an account, and to have the $3000 allowed on the mortgage. This debt from W. to C. and S. is to be allowed as a set-off: 2. Before the judgment it was optional with the mortgagee, but a matter of right in the mortgagors, to make this set-off: 3. By the judgment the right passed to the judgment creditors, the complainants, to set off: 4. The bank, as assignee of the mortgage, took it subject to all equities, and among others, to the set-off. The complainants filed the bill as trustees for the creditors of the defts., Caryl and Storrs, who, being indebted to several persons, January 17, 1817, executed to the complainants a bond, with a warrant of attorney, to confess judgment, and conditioned to pay $40,328.33 for the benefit of the said creditors. The bill stated the facts particularly of which the above is the substance. The mortgagors had an absolute right to set off the $3000 with Williams, the mortgagee, so his assignee; and the complainants, by their judgment against the mortgagors, bound all their rights in the mortgaged lands as they then existed, and to substitute the complainants in their place. So the mere rights of the mortgagors to *set-off* passed to their judgment creditors by force of the *judgment lien* on the mortgagor's right of redemption, which said creditors acquired, and when the mortgagee afterwards assigned to the Bank of Niagara said creditors had the same right to redeem and set off against it. *Fraud* in Williams, in assigning to the bank to defeat the set-off, was alleged, to give the court of chancery jurisdiction.

1 Hop. Ch. R. 579, 584, Rosevelt & al. v. Bank of Niagara.

§ 12. A plea of set-off must allege that the debt was due when the suit was commenced, also that it is still due.

1 Litt. 206.

§ 13. An assignee of an *open* account cannot set it off against an action brought against himself; but the assignee of a note not negotiable may set it off as a discount to a suit against him. The difference must be, the note was an *ascertained* demand and the *open* account was not.

2 Mc Cord, 476.

2 Mc Cord, 753.

§ 14. *Judgments.* One may be set off against another before third persons become interested. So one obtained in an inferior court may be set off against one in a superior court. Allowed when one has been assigned to a third person by the objector under *suspicious* circumstances.

Williams v. Evans, 2 Mc Cord, 203. 2 Mc Cord, 318.

VOL. V. CH. 168. *Art.* 1. *Con.*

§ 15. If a creditor sue a judgment for the benefit of an assignee of it, the deft. cannot set off a debt due to him from the assignee. Wheeler *v.* Raymond, 5 Cowen, 231, 236. Nor if the plt. sue as trustee can the deft. set off a debt the *cestui que trust* owes him. N. York R. L. 515.

ART. 5. *Con.*

§ 4. Under it, deft. may file an account for money had and received by the plt. to the deft's. use: 2. If a balance

4 Pick. 63–66.

appear to be due to the deft. he may have judgment for it in like manner as if the account had been filed under the statute 1784, c. 29.

2 N. H. Rep. 419, Colby *v.* Colby.

If an administratrix of an insolvent estate sue for a debt arising after her intestate's death, the deft. cannot *set off* the balance of her claim against the estate, after having received a dividend, with other creditors. Woodman *v.* Barber, id. 479 N. H. statute February 8, 1791; Lawes, 172, cites Montague on Set-off, 16, 34; Willes R. 103, 264; Bul. N. P. 130; 4 Mass. R. 327. The plt. might have sued *in her own right.*

§ 12 *con.* A surviving insolvent partner obtains judgment, after having assigned, and the state of the partnership accounts does not appear, the deft. is not allowed to *set off* a debt due to him by judgment from the plt. *personally:* 2.

Waln *v.* Anthony, 5 Serg. & R. 468.

After paying partnership debts, the plt's. share of the residue is liable to his separate creditors, and may perhaps be subject to such *set-off.*

A gave a bond to B; this B assigned to C, the husband of one of B's daughters, as an advance of her share of B's estate. B died intestate, and A administered on his estate. B's assignee sued A on the bond. Held, A might *set off* a

Dasher *v.* Lunaweaver, 8 Serg. & R. 200.

proportion of the amount overpaid by him in settling B's estate, if it did not appear that A had given the assignee reason to believe he had no set-off.

Though unliquidated damages in covenant, sounding in tort, cannot be set off as above, yet the deft. may prove acts of nonfeasance or misfeasance done by the plt., if these acts be immediately connected with the plt's. cause of action; and this to defeat it in whole or in part. But in *assumpsit* for goods sold and delivered the deft. cannot set off goods he

Gogel *v.* Jacoby, 5 Serg. & R. 117–122.

bought, which the vendor assigned to the plt. *for the deft.* and which the plt. detained and consigned to other persons.

The plt. sues for services by her performed, as a housekeeper, and for goods sold and delivered, evidence of the plt's. acts of malfeasance, in embezzling the deft's. property,

4 Serg. & R. 249.

is inadmissible by way of *set-off*, but may be proved on the plea of *non assumpsit*, and payment with leave of the court.

If the deft. call on the plt. to produce books and papers, on

5 Serg. & R. 515.

the trial, this does not authorize the deft. to make a set-off without special notice.

Vol. V. Ch. 168. Art. 5. Con.

Where the plea is of set-off, entered in short, and the deft. has refused a specification of his demand, he cannot offset. 5 Serg. & R. 404.

Assumpsit for the price of goods sold, the deft., by way of *set-off*, may avail himself of a breach of warranty of the goods, though he do not return the articles, or notify the vendor to take them away. 1 Serg. & R. 477.

In replevin, complaining property is unjustly taken and detained, and avowry for rent in arrear, the plt. cannot set off a book account on a replication, no rent in arrear. 2 Hals. 59–62.

Unliquidated damages, arising on contract, or tort, cannot be set-off. 1 Hals. 394, 395; 1 South. 306.

A assigns all his property to B and C to be sold by them to pay his debts. A's creditors not allowed to offset their demands against A in payment of articles they purchased at the auction of A's goods sold by B and C, his trustees, though B told them if they purchased they might so set off. Bateman v. Conner, 1 Hals. 104–109.

§ 24 *con.* But his lien on the cause for his fees does not exist till judgment is entered, hence gone, if the deft. settled the debt, &c. any time *before* judgment, though *after* the court has given its opinion. Attorney's lien, 4 Cowen, 416, 417. A is an underwriter in a policy, the broker of B is the assured for his benefit: A cannot set off the broker's debt. 12 Johns. R. 276; 15 id. 226. 3 Greenl. 34–38.

§ 29. If the surety bring *assumpsit* against the principal for monies paid for him, the principal may file, as a set-off, an account for money had and received to his use by the surety. Was on the statute 1793, c. 75, s. 4, allowed on the words 'monies paid.' It is a remedial statute and must have a liberal construction. 17 Mass. R. 66–68.

§ 30. But in *assumpsit* on two bills of exchange, drawn on and accepted by the plts. The defts. had filed in set-off a demand against the plts. for the amount of certain merchandize, sent to the plts. as commission merchants in New York, to sell and disposed of on account of the defts., which was received by the plts., sold and account rendered, shewing the balance due as claimed by the defts. when collected. The merchandize was sold on credit to one Upham, who had failed and was discharged under the insolvent act of New York. Held, the defts. could not file their claim, though the plts. *negligently* trusted Upham, for the case is not within the statute of 1793, c. 75. The set-off must be of 'goods sold and delivered, monies paid or services done.' Deft's. demand was for *negligence*. 17 Mass. R. 176, 178.

§ 31. A, B, and C, joint owners of a vessel: A got insurance in his own name on the freight for account of the three Columbian Ins. Co. v. Black, 18 Johns. R. 149.

Vol. V. Ch. 168. Art. 6. Con.

by a valued policy. Total loss and notice of abandonment duly given, but no adjustment. Held, A might set off this loss in an action against him by the insurers for *premiums* due to them on account of other policies of insurance.

Power v. Kent & al. 1 Cowen, 172—175.

§ 10. The demurrer having disposed of the whole cause in which issues were joined, and the deft. being entitled to judgment on demurrer, and also as on nonsuit, his attorney gave notice of his lien for costs, to the plt's. attorney, not to make any arrangements with the deft. which should affect the attorney's claim for costs. Held, an agreement between the deft's. and plt's. attorney to put the cause off with a view to settle the claim between the parties, and thereby stay the further progress of the suit, did not prevent the deft's. attorney from proceeding to move for judgment as in case of a nonsuit: 2. After actual notice, the parties have no right to settle the attorney's costs, or do any act to obstruct his proceeding in the cause, to collect them. Here the deft., the attorney's employer, was entitled to costs against the plt., who failed in his action; and 1 Cowen, 206–208.

Williams v. Crary, ex'r. 5 Cowen, 368–371.

§ 11. A set-off cannot be pleaded. It must be by notice with the general issue: 2. A bond which has been cancelled cannot be set-off: 3. If a legacy be given in satisfaction of a debt, it must be specially pleaded.

CHAPTER CLXIX.

PLEA—SAVED HARMLESS.

Art. 1. Con. 1 Rand. 53–57, Hatcher's adm'r. v. Hatcher's ex'rs.

Where a surety can enforce indemnity before he has paid. As where A buys land of C, and gives bonds with B, as his surety, for the purchase money, but takes no conveyance, nor pays. C, however, retains his lien on the land. In such case, B may in equity subject the land to the payment of the debt, before compelled to pay it himself.

Lease to A and B. B may prove he is only *surety;* so liable only for the time in the lease, and not for A's holding over. 2 Greenl. 42–46.

Art. 2. Con. 1 Rand. 328—343.

§ 3 *con.* It is clear there is no *contribution* among *wrong doers;* but there is among contractors joining to pay, &c.; also in cases where the act of him claiming contribution does not proceed *ex maleficio*, or from some actual fraud or voluntary wrong. See ch. 42, a. 1, s. 13; 7 Johns. Ch. R. 211.

A decree may be rendered between co-defts. where their respective rights and obligations are ascertained and established by the pleadings and proofs between the plt. and all the defts. 2 Rand. 5–20.

If there be several sureties in a bond, and the principal conveys property in trust, to indemnify some of them, and the rest are not provided for in the deed, the latter will be protected by the deed of trust. Was a case in Chancery. 2 Rand. 414–438, McMahon & al. *v.* Fawcett & al.

One endorser has no right to *contribution* against the other endorsers, where the several endorsements were made for the drawer's accommodation, unless there be an agreement to that effect. 4 Rand. 553–563.

In all motions by one surety against another, it is necessary to prove the insolvency of the principal; otherwise no judgment can be rendered under the act of 1798, authorizing sureties to recover *by motion* against their co-sureties, the notice and motion may be joint, though the recovery must be several: 2. And in such case it is no objection to the jurisdiction of the circuit court, that the sum claimed against each surety, severally, does not amount to $50. Lampton v. Bruner, 2 Litt. 144.

Since the act of 1801, the court will not permit a surety to confess judgment, if the principal in court offer to defend and tender sufficient counter security: 2. The surety need not give the principal notice of a suit or motion against him: 3. If a surety get judgment for too much, that or any other material fact, may be stated in the petition for a *certiorari*, and will be inquired into on the petition. 4 Hayw. 240, Williams v. Greer.

The same principle as in Toussaint *v.* Martinaul, a. 2, s. 5. But extended to a surety's indemnifying bond, not for a special sum, but conditioned to pay certain endorsements, made and to be made by him, for the obligors; and to indemnify against costs, &c. May issue execution for the whole penalty without motion subject to specified directions to the sheriff as to the amount to be levied as soon as he can ascertain it. Also, they may, on motion, make order for securing the sum to be levied to the creditors, to whom the surety is bound, if they see this is necessary. Cited 9 John. 80; id. 283; 12 id. 350; 18 id. 505, Auburn Bank *v.* Throop; 4 John. Ch. R. 619—648–687; 5 id. 326; 2 Cowen's R. 456; 2 D. & E. 100; id. 600, Toussaint *v.* Martinaul. 5 Cowen, 441–445.

§ 7. *Custom House surety.* See ch. 39, a. 22. When A gives his bond for duties on goods imported into the United States for B, the importer, and B is not bound in the bond. If A pay the bond, *it seems* he cannot be placed in the condition of the United States, as to *priority* in a claim against A: 2. Upon general principles of *equity*, A, in such case, will be *substituted* in the place of the creditor, (the U. S.) and have every preference the U. S. were entitled to: 3. Equity does not regard form, but substance. 4 Rand. 438–448.

§ 8. *The rights of the surety who pays the mortgagee his debt.* This does not extinguish the security, but the surety succeeds to all the rights of the mortgagee against the principal on taking an assignment, and may enter and hold land in mortgage for the debt. Norton did not sign the note, as surety, but in the mortgage the debt appeared to be, as it was, Soule's debt. He had been sued, and taken the poor debtor's oath. See Popkin *v.* Bumstead, ch. 112, a. 5, s. 29; 4 Cowen, 173–189, Thomas *v.* Woods.

2 Greenl. 341–347, Norton *v.* Soule.

§ 9. Debt on bond. Held, the surety's contract is to be construed strictly, and not to be extended beyond the fair scope of its terms. Was a bond given conditioned for the faithful performance of the duties of the office of a deputy collector of direct taxes, for eight certain townships in New Jersey, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties. Held, they were discharged from their responsibility for monies, *subsequently* collected by the principal. The alteration was by entering the other township in said instrument by the obligee by consent only of the principal obligor. The judges in the circuit court were divided in opinion. The monies the deputy received after the alteration, were received in the eight townships, and not accounted for by him. As to the surety, 'it is not sufficient, that he may sustain no injury by a change in the contracts, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract.' See ch. 52, a. 2, s. 4, Johnson *v.* Todd. Justices dissented, on the ground the bond remained the same, as to the surety; as he remained liable only as to the eight townships, and no more, as to which eight only, the obligee made claim.

9 Wheat. 680–719, Miller *v.* Stewart and others.

§ 10. *Liability of the sureties is confined to the duties and obligations created by the acts passed before the date of the bond.* As where a bond was given December 4, 1818, for faithfully discharging the duties of a collector of direct taxes and internal duties, appointed under the act of congress of July 22, 1813, ch. 16, by the President November 11, 1813, to hold the office until the end of the next session of the senate, and no longer, and subsequently appointed by the President, with the advice and consent of the senate, January 24, 1814, is to be restricted, (as to the liability of sureties) to the duties, &c., created by the collection acts, enacted before the date of the bond: 2. The said second commission, January 24, 1814, revoked the first, and the liability of the sureties was confined to the duration of the said first commission: 3. In general, laches is not imputable to the government: and 4.

9 Wheat. 720–738, The U. States *v.* Kirkpatrick and others.

When the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, or the neglect of the officer or agent to account will not discharge his sureties: 5. Neither debtor or creditor has a right to apply the payment after the controversy has arisen: 6. In long running accounts where balances are stated merely to make rests, the law applies payment to the oldest debts. Ch. 144, a. 13, s. 12; 14 East. 510, Nares *v.* Rowles; People *v.* Jansen, ch. 144, a. 13, s. 23; 13 East. 239; 11 Wheat. 184–191, U. States *v.* Vanzandt, like Kirkpatrick's case.

§ 7. A judgment against the principal debtor in a bond, cannot be given in evidence in an action on it against the surety. 3 Har. & McH. 242–243; see ch. 96, a. 1, s. 23.

See sureties, when discharged or not, ch. 144, a. 13, s. 20, &c.; a. 14, s. 14, 15, 16; see ch. 161, a. 1, s. 10.

A surety in a bond, is not, like an endorser, discharged by the negligence of the obligee; all obligors are absolutely and unconditionally bound. 1 McCord, 145.

2 Rand. 823—358, Norris *v.* Crummey and others.

If the creditor indulge the principal debtor, the surety is not discharged, unless the creditor bind himself, in law or equity, not to pursue his remedy against the principal for any length of time. A surety, when bound to fulfil the sheriff's promise to the debtor to pay his debt to the creditor. Judge Green, as to discharge of the surety, said 'a judgment with a stay of execution entered of record, prevents the plt. at law from proceeding immediately, against the principal, absolves the surety; and an agreement to give time, founded on a valuable consideration, such as giving new security, would be obligatory, and would be enforced in equity, such an agreement would, also, discharge the surety.' It seems clear, that by so giving and *securing* more time to the principal debtor, the remedy both of the creditor, and the debtor's surety, is postponed to the injury of the surety in a manner unknown in his undertaking as surety, the surety's remedy is impaired. See ch. 144, a. 13, s. 20; same principle and many cases there; also here, as 3 Merivale, 272; 3 Atk. 91; 1 Bos. & P. 422; 6 Ves. 809; 6 Taunt. 379; 3 Call, 69; 6 Munf. 6; Gilm. R. 149–328. So the surety may be discharged if the creditor deprive him of his remedy in equity, by bill *quia timet*. The same principles, 4 Rand. 104–112, Hunter's administrators *v.* Jett, 12 Wheat. 505–511, U. States *v.* Nicholl. A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingencies, not proved to have been complied with, or to have happened, will not discharge the sureties. Act of congress, May 15,

Nichols *v.* Smith, 2 Bro. Ch. Ca. 579.

Vol. V. Ch. 169. *Art.* 4. *Con.*

1820, Eden. 31 ; 12 Wheat. 511–515, McGill, &c. *v.* U. S. Bank.

§ 8. *Assumpsit* by one surety *v.* another. Held, if one in a bail bond, voluntarily pay the judgment recovered against the principal, after execution issued and *non est inventus* returned, but before *scire facias* served and entered, he cannot compel his cosurety to a contribution. The court said, 'in the case of a voluntarily payment of money, actually due, to avoid a suit, there is no doubt, that he, who pays the money, may compel his cosurety to contribute.' Here, the sureties are answerable only in case the principal fail to abide the judgment, and they can surrender him at any time before final judgment against them, upon the *scire facias*, they paying the costs of that suit: statute 1784, ch. 10, s. 2; 'this is a valuable privilege to the bail, which ought not to be interrupted by one, to the prejudice of the other.' See statute 1817, 140: see ch. 9, s. 17, s. 10, &c.

16 Mass. R. 40–43, Skillin *v.* Merril.

§ 9. *Bank sureties in the cashier's bond, how held.* Debt on the cashier's bond, with two sureties in common form, given when he was first appointed, March 1814: was again appointed Oct. 1814, 1815, and 1817: he continued to act till 1823, when he committed a breach of duty: objected that his sureties were not held; but decided they were; for though the bond was given on his first election, it was 'so long as he should continue in said office,' it not appearing in the bond, charter, or records of the bank, that the cashier's office was an annual office. It is to be inferred, that had it appeared to be an annual office, the sureties would have been held but for the first appointment.

3 Pick. 335–341, the President, &c. of Dedham Bank. *v.* Chickering & al.

§ 10. Debt on his cashier bond, above stated. Held, 1. his sureties were liable for his misconduct while acting in his office of cashier: 2. Not when he acted as an attorney to the bank, nor when he speculated, or conducted illegally or fraudulently, in connexion with the directors, nor 3. Where they were negligent in holding him to his duty as cashier, to the disadvantage of his sureties. But what in such case is misconduct, as cashier or not, seems to be a question depending on facts and circumstances.

4 Pick. 314–341, Dedham Bank *v.* Chickering & al., *his sureties.*

§ 11. To discharge a *security* in a note, there must be an agreement between the creditor and principle debtor, for delay, or otherwise changing the nature of the contract to the prejudice of the surety, and this agreement must have a sufficient consideration, and be binding in law, on the parties: 2. So to discharge the *endorser* if he has been fixed. English *v.* Darley, 2 Bos. & P. 61; Lord Elden said, 'as long as the holder is passive, all his remedies remain;' and our court said, 'we add, that he is not bound to active diligence.'

12 Wheat. 554–558, Mc Lemon, plt. in error, *v.* Powell & al. 1 Bos. & P. 652–658, Gilmer, 149. 4 Barn. & Cres. 506.

§ 12. *Surety discharged.* *Assumpsit* against an endorser of

a note for the maker's accommodation. The plt., the endorsee, signed an agreement to accept five shillings in the pound from the maker, in full of his demand, on having security for that sum. Held, the agreement discharged the surety.

§ 13. *Surety discharged or not, in New York.* The rules are the same in equity, as at law, when the facts are the same. 1. If the creditor, by express agreement with the principal, varies the terms of the contract by enlarging the time of performance, without the surety's consent, he is discharged: 2. Mere delay of the creditor to call on the principle debtor for payment, does not discharge the surety: 3. But it seems, if the surety request the creditor to sue, and collect the debt of the principal, and the creditor refuses, or delays to sue till the principal becomes insolvent, surety will be relieved in equity: 4. Where the surety has made his defence at law, and is overruled, he cannot, afterwards, on the same facts only, be relieved in equity: 5. Where the creditor does an act injurious to the surety, or omits to do an act required by him, which is the creditor's duty to do, and thereby the surety is injured, he is discharged when at law. See other authorities on these and similar points: 2 Johns. Ch. R. 554; 4 do. 123, 329, 538; 5 do. 305; these principles extend to bail, and all in the nature of sureties.

17 Johns. R. 384, on appeal from chancery, King *v.* Baldwin.

ART. 5. *Con.*

§ 9 *con. Assumpsit* on a note signed by James Ellis, one of the defts., as principal, and Bridgman, the other, as surety, payable to the plt's. testator on demand, dated Dec. 9, 1802: more than twenty years had elapsed before it was sued: but May 15, 1815, &c., this, and several previous payments were made by the principal. The surety urged that he ought not to be affected by these payments, made without his assent or knowledge, and solely by the principal; that no notice was ever given to him, the surety, the note was paid, till just before it was sued; that he was discharged by the negligence of the holder of the note, in not obtaining payment of the principal, and in not giving notice to him, the surety, nor making any demand on him. The parties lived near together, &c. Judgment for the plt.: and the court held, the mere delay of the creditor to proceed against the principal, without some contracts binding him not to proceed against him, or a request by the surety that he would enforce the demand, will not discharge the surety. See ch. 144, a. 13, 20, 21, and several cases there cited; Doug. 652; 2 H. Bl. 340; 6 Johns. R. 267, and many other cases cited in this of Hunt, &c.: all seem to agree that the creditor *must do some act*, to vary the terms of the contract, to make it more against the surety than the one he signed.

2 Pick. 590—581, Hunt, ex'r. *v.* Bridgman.

19 Johns. R. 58—69; 15 do. 433; 16 do. 77.

§ 15. *The amount the surety recovers* in case of a bond for paying monies, of the principal, is the sum he has paid, with all reasonable expenses he has been obliged to incur: not such

17 Mass. R. 169—174.

Vol. V. Ch. 169. Art. 5. Con.

extraordinary and remote expenses as might have been prevented by payment of the bond.

§ 16. Special declaration stating the case. The plt. and the deft's. testator were sureties in the probate office for Eben Fisk, guardian of Elbridge Fisk, a minor. The guardian failed; Batchelder settled the bond, and got part security. Held, he could maintain *assumpsit* against his cosecurity, for half the sum the plt. paid, considering the security in part, for the benefit of both sureties; and so against the executors of the cosurety deceased, on his implied promise, though the plt. paid after he died.

17 Mass. R. 464, Batchelder v. Fisk & al., ex'rs.

§ 17. *Surety for a deputy sheriff, how held.* Debt on bond against the sureties, &c., of a deputy sheriff, given to the plt. as sheriff, &c., conditioned that the deputy (principal,) should faithfully perform his duties, and save the plt. harmless from all suits, costs, expenses, &c., occasioned by the misconduct of such deputy. It is no plea, that before the breach complained of, the sureties gave notice to the plt. of the deputy's unfitness for office, and requested his removal: the rule applied, *unumquodque dissolvitur, &c.* See ch. 179, a. 5, s. 13, 8 Taunt. 51–596.

2 Pick. R. 612, Crane v. Newell & al.

§ 18. 3 Mason, 446, Lock in error *v.* Postmaster General of the United States. His neglect to sue for balances due by postmasters within the legal time does not discharge the sureties.

§ 19. *Surety not discharged.* *Assumpsit* on a joint and several promissory note made by Jos. Lovell, principal, and deft. surety, Feb. 1824, payable to C. Wheeler, or order on demand, with interest, and endorsed to the plts. Defence, April 5, 1825, Wheeler sued the principal, and attached goods sufficient: they were left with the deft. on the receipt of the plts., to the officer. Action entered, and pending it in the C. P., the note was endorsed to the plts.; the principal's circumstances were then doubtful. Joseph held the said goods two or three months after attached, when several of his creditors attached part of them. A part not so attached, the plts. took and held, till Wheeler got judgment for his demand, exclusive of the note, and sold to satisfy that judgment. It seems the plts. might have secured a horse and chaise: in this state of things the plts. being liable to the officer, and he to Wheeler, they paid him, and he endorsed the note to them at their risk: they sued Lovell the surety, and recovered. Before the note was endorsed, he requested Wheeler not to endorse it, &c., noticing his attachment. Held, 1. The creditor is not obliged to pursue the principal on the mere request of the surety; but he must offer indemnity as to the costs of the suit, though the principal afterward became insolvent: 2. The law did not require Wheeler to prosecute his action he had commenced, though he

5 Pick. 307–312, Bellows & al. v. Cyrus Lovell.

had a good attachment: he might honestly elect a more expeditious way to get payment of his debt. Vol. V. Ch. 169. *Art.* 5. *Con.*

§ 20. A surety, in a bond, a short time before his death, directed his wife to request an obligee to sue the principal, then able to pay. Five months after the surety's death, his widow, not administratrix, stated the request to the obligee: he offered her the bond to sue it; she refused. Held, the surety was not discharged, though by the obligee's delay to sue the principal, the remedy against him was lost. The court adhered to the rule in Cape *v.* Smith, 8 Serg. & R. 110, that is, that the surety is discharged only when the obligee refuses to sue, or to allow the surety to sue in the obligee's name, after the surety's positive request and explicit declaration, that he otherwise held himself exonerated. p. 69. Held, if a person entitled to a share in the estate of an intestate, takes the administrator's bond for it, the surety in the administration bond is discharged as to the share. 15 Serg. & R. 28, &c., Gardner & al., adm'r., *v.* Ferries.

CHAPTER CLXX.

DEBT. PLEA—TENDER, AND BRINGING MONEY INTO COURT.

§ 7. See this case, Wild *v.* Hadley, 1 N. H. Rep. 205–331, A. D. 1818, decided as above. The court in New Hampshire seems to have relied on the old cases, as 1 Co. Lit. 207; 9 Co. 79, Peytoe's case; 2 Rol. Abr. 524; Cro. Jam. 126, admit the old doctrine was founded on the year book, 21, E. 4, 25, where the case was this: in debt on bond conditioned to pay £40 on a certain day, and a like sum on diverse days afterwards. The deft. pleaded payment of all the sums on the several days, except the last day, and as to that day, he alleged that he paid to the plt., on the last day £20, and tendered £20 more, which the plt. refused, and said he had been always ready, and still was ready to pay the £20, and brought the money into court. The plt. refused to receive the money, and took issue on the tender. The court said, that the deft. was entitled to take his money out of court, and it was delivered to him. The reporter says, 'now the intent of the plt., is, by this issue, to cause the whole obligation to be forfeited, and it seems, that if this be found against him, he shall never have the £20, for since it is delivered to the deft. again, there is no way to make him pay it: also the plt. has made his refusal a matter of record, and took the issue at his peril.' The court admit the law is now changed, and cite the opinion of Bullard, J., in Le Grew *v.* Cook; stated rule 25, post, and art. 14, post. But the court in support of its decision cited Fowell's case, rule 8, post, and similar cases in which a tender discharges the demand: see many of them in this and other chapters: see the word Tender in the index. Though on the whole we may consider the point as Art. 1. *Con.*

Vol. V. Ch. 170. *Art.* 1. *Con.*

unsettled, yet I have an impression, in attending to many other cases, also, that the decision in New Hampshire is made on principles too narrow and contracted. It allows not a single intendment or inference in support of the justice of the case.

§ 8. A tender of money due on a judgment, does not discharge it, nor take away the *lien* of the judgment creditor, but he may still redeem on it as a judgment creditor within the statute, 43 Sess. ch. 184, s. 3: A tender must be made before the action is brought: 3. After judgment, a tender can avail only by bringing the money into the court to move, &c.

Jackson v. Law, &c., 5 Cowen, 248–253.

5 Pick. 187–189, Dewey v. Humphrey.

§ 9. Covenant broken to recover rent, said to be due on an indenture of lease. Plea payment of $20 when due, as to the rest, a tender on a day subsequent to the day of payment stated in the lease, but before the suit was commenced, and issue. Held, the plea of tender was insufficient. Judgment for the plt., though there was a verdict for the deft. Tender before the last day is bad, except to the creditor in person.

3 Har. & Mc Henry, 85–91.

Art. 2. *Con.*

Rule 42 *con.* *Assumpsit* for money had and received; case stated. Suffolk Bank held the bills of Worcester Bank to the amount of $48,000 not on interest; called for payment $28,000 paid in specie. Soon after $20,000 and a small sum for costs and interest were deposited in specie in another Boston Bank to pay the balance and notice to the Suffolk Bank the deposit was to its use, not being received, the deposit was brought into court in the action about four months after made. Held, 1. A tender after action brought of said balance and costs, and so placing it in the power of the creditors, though not a bar to the action, stopped the interest of 2 per cent. a month, the statute penalty for a bank's refusal to redeem its notes when presented: 2. The like principle applies in this case of a promissory note, not engaging interest. Such offer not strictly a tender, is sufficient to stop the running of simple interest, *as damages for detention.*

5 Pick. 106–112, Suffolk Bank v. Worcester Bank.

Art. 3. *Con.*

§ 1 *con.* If the tender be at the day and place appointed, and the payee do not appear, there must be a *profert in curia.* 17 Mass. R. 389–397.

If the endorser of a note make a tender the day after it becomes due, he must tender interest. 8 Pick. 414–419, City Bank *v.* Cutter & al.

Art. 5. *Con.*

§ 7 *con.* Held, 1. In general, payment received in forged paper, or any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or on his original contract or demand: 2. But this principle does not apply to a payment made *bona fide* to a Bank, in its own notes, received as cash, and afterwards found to be forged.

10 Wheat. 333–358, United States Bank v. the Bank of Georgia.

Decided if a man receive in payment or exchange a *counter-*

fait or *forged* bank note, he may treat it as a nullity, and recover back the amount, though the party passing the same may be guilty of no fraud. 2 Hawks, 326. Vol. V. Ch. 170. *Art.* 13. *Con.*

§ 18 *con.* Where two breaches were assigned in one count of a declaration on a contract, and the deft. paid money into court on one of them: held, he, thereby, admitted the whole contract as stated in that count. 1 Barn. & Cres. 3.

CHAPTER CLXXI.

REPLEVIN.

§ 3. It seems that all the English statutes down to 11th George, 2d, chap. 14, inclusive in relation to replevins and distress, though they are not made of force in this State by any statute, have been adopted in practice: 2. Judgment in replevin is conclusive evidence the deft. was the tenant of the plt. at a particular rent, &c.: 3. If the goods distrained and replevied be not regularly appraised according to the act of the legislature, the objection must be made in the action of replevin, and cannot be taken in an action on the replevin bond, the former judgment concludes the party: 4. The assignee of a replevin bond may sue it in his own name. *Art.* 1. *Con.* 1 McCord, 299.

Replevin is a *local* action. 4 Cowen, 45–46.

§ 1 *con.* *So possession.* Hence, if A lease *his* goods to B for a year, A cannot have replevin during the year, as he has not the possession or right of possession. 4 Pick. 168. *Art.* 2. *Con.*

§ 12 *con.* In England the replevin bond is taken to the sheriff at common law; in Massachusetts, on statute to the party; in New Hampshire on statutes, 1 N. H. Laws, 413; but not said to whom to be taken. Hence one taken payable to the sheriff, his representatives, or assigns, is valid; and though but one surety in it, and *charges* mentioned in the statute may be included in the words damages and costs in the bond: 2. An obligation to an officer and his 'successor,' does not without a statute, enable the successsor to sue in his own name: 3. Where the sheriff or other person is a *nominal* plt. suing in trust for the benefit of others, such plt. cannot release, and his release notwithstanding, the proceedings will go on. *Art.* 3. *Con.* 2 N. H. Rep. 39–42, Sumner v. Steward. 1 Wheat. 85.

A replevin bond made to the replevying officer instead of the deft. in replevin, is void. 5 Pick. 226.

§ 5. 1 Pick. R. 284–288. Condition the obligor prosecute his action of replevin to final judgment, is saved by his prosecuting, till the deft's. death abates the writ. See a. 6, s. 11; 1 N. H. Rep. 187–188. *Art.* 4. *Con.*

Vol. V. Ch. 171. Art. 7. Con.

§ 3. Under the plea of property in a stranger, and not in the plt. the deft may prove the sale by the stranger is fraudulent under which the plt. claims; 1 Pick. R. 357–362, Quincy v. Hall. And 1 Greenl. 133–135, the jurisdiction of the common pleas, in replevin, is regulated by the *real* value of the goods; and is not affected by stat. 1807, c. 123, enlarging the jurisdiction of a justice of the peace.

Art. 12. Con.

§ 1. *con.* There is no general issue to an avowry, but some point must be traversed. Goods taken on distress for rent, the plea *riens in arriere*, admits a tenancy exists, and puts the defence on a matter subsequent. 5 Serg. & R. 355; Hill v. Miller; 5 Serg. & R. 130–133; 1 Pick. 357.

§ 28. Where the deft. distrains and avows for rent of his wife's land, he must join her in the proceedings, or show the rent accrued after the marriage.

1 Johns. R. 479.

§ 29. On a return of elongata to a writ of *returno habendo*, not necessary to issue a *scire facias* against the pledges, but if insufficient pledges are taken, or no pledges at all, the plt. has his action on the case, against the sheriff: 2. The plt. can claim damages only to the value of the goods. (Act sess. 11, ch. 5, s. 8,) he must allege a writ of *returno habendo* has been issued, and *elongata* returned: 3. Must declare according to the words of the act: 4. Under the 4th sect. the sheriff may take such security as he pleases, in his own name, and at his peril: 5. It seems the court may compel him to assign the bond to the deft. in replevin.

Gibbs v. Bull, 18 Johns. R. 435.

§ 30. No *venue* is necessary to a plea, or to a demise in an *avowry* for a distress, &c. in replevin. Davis v. Tyler, 18 Johns. R. 490.

§ 31. Replevin for two mares and a colt. Deft. avowed distraining for rent. Held, 1. He must state his title, but if seized in fee, enough he state he was, &c. seized in his demesne as of fee: 2. If he has a life estate, he must state the seisin in fee, and trace the title to himself particularly, down through its different stages: 3. If he claim under A's lease he must shew his estate, and so trace it to himself: 4. If he avow, as executor, for rent, he must shew it accrued in the testator's lifetime: 5. If deft. avow a distress of cattle of a *stranger* for rent, he need not show they were *levant and couchant* on the demised premises: 6. It is sufficient to say they were there; and it lies with the plt. to plead they were not *levant and couchant*.

Wright v. Williams, 5 Cowen, 338.

Art. 13. Con.

§ 11 *con.* When the goods are delivered to the plt. and the verdict is for the deft. the judgment is for a return and damages for the taking. When the goods are delivered to the plt. and judgment is for him, it is that he recover his damages for the taking, &c., and full costs.

5 Serg. & R. 132—139, Easton v. Worthington.

§ 17 *con.* It must be admitted replevin on an unlawful de-

tainer only is a very useful and equitable remedy in many cases. As there are many in which the owner of property ought to recover it specifically rather than damages, when illegally kept from him, though not tortiously taken from him. 16 Mass. R. 147–157, Baker & al. *v.* Fales, numerous cases cited, and the cause largely considered. Same decision, 17 Mass. R. 606–613, but one question, Is the law so?

But, 1 Mason, 319–323, Meany *v.* Head. Held, replevin does not lie unless there has been an *unlawful taking* from the possession of another; and if no such taking, on *non cepit*, the issue must be for the debt.

And replevin lies for an *unlawful taking* of a chattel: 2. Possession by the plt. and an actual wrongful taking by the deft. supports replevin. id. Is grounded on a *tortious taking*, and sounds in damages. 10 Johns. R. 369. See Court Martial, c. 186, a. 4, s. 13–19.

Crisson *v.* Stout, 17 Johns. R. 116; 7 do. 140.

CHAPTER CLXXII.

TRESPASS.

§ 1. Though actual possession of land is necessary to support trespass, yet to render the possession actual, it is sufficient if the property be occasionally used for the appropriate purposes, as a pasture for grazing, a church for divine worship.

3 Marsh. 382.

Where possession of land is delivered to the plt's. agent by the sheriff on a *habere facias*, this possession is sufficient to enable the plt. to maintain trespass, and though the agent afterwards departs from the land, the possession is presumed to continue in the plt. unless he does some act shewing his intention to abandon it; and cattle ranging at large in the woods, are still intended to be in the constructive possession of the owner.

Speed *v.* Ripperdon, 1 Litt. 189.

§ 12. *Trespass—how limited. The justice's jurisdiction, &c.* The statute 1783, ch. 42, providing that an action of trespass brought before a justice of the peace may be removed into the court of common pleas, by plea of title to real estate, comprehends all actions of trespass, as *de bonis asportatis*, &c. and not merely trespass *quare clausum fregit*: 2. If the deft. offer such plea of title and the justice refuse it, deft. ought to appeal, but if he do not, and pleads the general issue, and judgment against him, and therefrom he appeals, the common pleas, on motion, may allow him to plead title: 3. In an action so brought into the common pleas, by such plea of title to land, an appeal lies from the common pleas to the supreme judicial court. The action was for the deft's. taking wood from a certain piece of land whereon it grew.

4 Pick. 169–173, Blood *v.* Kemp.

§ 13. Trespass and trespass on the case are concurrent remedies, where property is removed by force and converted; but the rule of damage in trespass, when property is removed to a distance and left, is the actual injury, and not the value of the property merely. Under some circumstances case is most proper, as trover to recover the value of the property converted; but trespass is to be supported when a tort has been committed on property, in which the plt. has an interest and possession, actual or constructive, as where a sheriff attaches property and delivers it to a receipter, and he to A, whose servant removes and leaves it at a distance, trespass lies against the servant, though ignorant, when he removed it, of the officer's interest in it. The rule of damage is not the value of the property, unless the deft. converted it to his own use, but merely the injury caused by such removal of it. The officer and plt. was a deputy sheriff. The property was a sleigh the deft. carried to New York and left. Possession alone of property supports trespass against a stranger who disturbs that possession. As to cutting trees, &c. see ch. 78, a. 4, s. 6.

2 N. H. Rep. 67.

§ 14. Possession of land is evidence of title to be left to a jury. A disseisin which disables the disseisee to maintain trespass for acts done on the land after the disseisin until he reenters, must be actual dispossession and holding out the disseisee: 2. If the disseisin be not kept up, the disseisee may have trespass *quare clausum fregit* against third persons for subsequent entries.

2 N. H. Rep. 456-458, Wendall v. Blanchard & al.

§ 15. Where an act, the result of *negligence*, is the *immediate* and *direct* cause of an injury, trespass lies. Percival *v.* Hickey, 18 Johns. R. 257. So even if not intentional. 19 do. 381.

§ 16. The words *vi et armis* do not necessarily make a writ in trespass; though a writ contain them, still it may be in *case*, and these words may be rejected as surplusage.

2 Mc Cord, 386.

§ 17. Trespass *vi et armis*, without the words *clausum fregit*, may be supported by one who has only *possession* without title. Caldwell *v.* Julian, 2 Const. Rep. 294.

§ 18. Where the plt. is in *actual* possession of an entire tract of land, but not cultivated nor enclosed, and even without any *written* evidence of title, but not of the particular part trespassed on, yet he may maintain trespass *quare clausum fregit* for a trespass on such part. This no doubt means against a mere wrong doer; but hunting on unenclosed lands is not a ground of an action of trespass.

Gambling *v.* Prince, 2 Nott & Mc Cord, 138.

2 Nott & Mc Cord, 338.

§ 19. Trespass *vi et armis* is the proper form of action by a parent, where a child is taken or detained from him. Vaughan *v.* Rhodes, 2 Mc Cord, 227; see ch. 64.

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§ 20. Trespass *quare clausum fregit* against Osborn, who acted as a servant under the direction of Barker, (disseisor,) in removing the building, the trespass stated, pending the ejectment. Held, 1. The lessor therein may have trespass against the deft. therein, or his servant, for an injury done the freehold, intermediate, the verdict and *habere fac. poss.* executed. It is true trespass *q. c. f.* lies only for him who has actual possession when the trespass is committed. But, 2. It is also true, that in case of *disseisin*, the disseisee, after he has regained possession by reentry, may maintain trespass against the disseisor, or his servants, for acts *intermediate the disseisin and reentry; for, as to them, the law, after the reentry, supposes the freehold to have continued in the disseisee*, as in the case of Lifford, 11 Co. 51, and many other cases cited in this work. The only difficulty is, said the court, on the point, whether the remedy shall extend to a stranger, who comes in by title under the disseisor, or be confined to him and his servants. Doubtful as to such stranger, 3 Caines R. 261–263; Weekham *v.* Freeman, 12 Johns. 184; 6 Bac. Abr. 566, &c.: 3. The record of the recovery in ejectment is competent evidence against the deft. Osborn: 4. A judgment is evidence, not only against the party, but also against those claiming, or acting, under him. The better opinion is that it is valid against the stranger above mentioned holding under the disseisor only.

Dewey *v.* Osborn, 4 Cowen, 329–339.

Art. 2. *Con.*

§ 11. Trespass *ab initio*. This was trespass for breaking and entering the plt's. dwelling house and remaining there till the plt. paid him £119 10*s*. 9*d*., &c. Deft. justified under a *fieri facias* to the sheriff of S. and a warrant, &c. to the deft., as bailiff, directing him to levy £——. Replication, that before said writ and warrant were fully executed, the deft. demanded and received £3 10*s*. more than he was authorized to levy. On demurrer, held, the replication was bad, as the facts alleged in it did not make the deft. a trespasser *ab initio*. Not so, because the subsequent act was not a trespass, as in Carpenter's case, sec. 5, third rule. Cited for the plt. the said case; Gates *v.* Bayley, 2313; 11 East, 395; Griffin *v.* Scott, 2 Ld. Raym. 1424; Aitkenhead *v.* Blades, 5 Taunt. 198; Girling's case, Cro. Car. 446.

5 Barn. & Cres. 485–491, Shortland *v.* Govett.

§ 12. If a person lawfully enter my house and continue after requested to depart, he becomes a trespasser *ab initio*. But where an act is legally done, it cannot be a trespass *ab initio*, unless by some positive law. The mere intention to do a subsequent illegal act, is not sufficient to render the first act unlawful.

12 Johns. R. 408.

Gates *v.* Lounsbury, 20 Johns. R. 427.

§ 13. Trespass for cutting and carrying away trees from

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the plt's. land, he cannot waive the tort and sue in *assumpsit* unless the trees have been sold by the deft. 5 Pick. 285–291, Jones *v.* Hoar. See ch. 7, this subject at large.

ART. 3. *Con.*

3 Greenl. 6–17, Little *v.* Palister.

§ 7. Trespass *quare clausum fregit* by the owner of land in the possession of his tenant at will, against the deft., who entered on it and threw down some fence and trod down some grass. The fences were erected by the tenant for his own convenience. Held, the owner could not support trespass, but the remedy belonged to the tenant, the injury wholly to his rights and not to any permanent rights of the landlord, Little. The court noticed the statutes of Massachusetts and Maine do not admit a tenant at will to be viewed as a tenant from *year to year*. See 1 Taunt. 193; 4 Taunt. 316; 14 East, 490. The many other cases cited are found in this work.

ART. 4. *Con.*

§ 3 *con.* 2 Pick. R. 353, 354, as to the acts of a majority of the committee. Damon *v.* Granby.

2 Nott & McCord, 138, 141, Gambling *v.* Prince.

Trespass *quare cl. fr.* lies for a trespass on lands not cultivated and not enclosed, and a part of an entire tract of which the plt. is in actual possession, though not of the part trespassed on, and even without any written evidence of title: 2. In such an action the title does not necessarily come in question: 3. A license to enter must be pleaded.

§ 10. So the deft's. plea of title, though not replied to, puts an end to the justice's jurisdiction, except to take the recognisance. 3 Greenl. 256–260.

§ 15. One having the *general* property of goods need not prove possession, as the law annexes it to property. *Aliter* as to *special* property, the plt. must prove that he once had *actual* possession, *without* which no *special* property is complete, but as to real estates there is no constructive possession, and to support trespass the plt. must have actual possession at the time of the injury. 3 Serg. & R. 509–515; 2 Browne, 109–111; 4 Yeates, 218; 2 Serg. & R. 358. The owner of wild land is deemed in possession so as to maintain trespass till adverse possession is made out. 3 Serg. & R. 514; 14 John. 119.

ART. 7. *Con.*

3 Serg. & R. 206.

§ 15 *con.* In trespass with a *continuando* the plt. may waive the *continuando*, and prove a trespass any time before the commencement of his action, or he may give evidence that goes only to part of the time laid in his continuando.

ART. 9. *Con.*

16 Mass. R. 450–451.

§ 1. Trespass for assault and battery and false imprisonment. Held, where one sues an action before a justice of the peace, on which the deft. is arrested, is not liable in trespass for false imprisonment, because from he absence of the justice at the return day, the action is not entered; for the writ being

good when served, the arrest was not tortious, and the justice had jurisdiction of the cause.

§ 9. But where a belligerent cruiser chases a neutral vessel for the purpose of a capture, as being an enemy, or for search, as being a neutral, and the neutral heaves to in the night, and the belligerent through *negligence* comes up and sinks her, her owner has trespass, at common law, against the belligerent commander, for damages. This is viewed as a *marine tort* merely, of which the common law has jurisdiction as well as the instance Court of Admiralty. Guille *v.* Swan, 19 Johns. R. 381.

CHAPTER CLXXIII.

TRESPASS—PLEADINGS IN.

ART. 1. *Con.*

§ 12 *con.* As every *continuation* of an illegal imprisonment is a new trespass, a recovery in an action commenced during the imprisonment, is no bar to another action, brought after it has ceased, for an assault, battery, and imprisonment, and if so pleaded, the plt. may new assign for the continuance of the imprisonment. 16 Mass. R. 389.

§ 15 *con.* *In trespass quare clausum fregit*, alleged to have been committed on *divers days and times*, if the plt. give evidence of one or more acts of trespass within the days specified, he is not allowed to prove an act done at any other time; but if he so elect, he may waive his right to prove any act within the days, and may prove one done at any other time allowed by the act of limitations. 16 Mass. R. 470–473.

ART. 4. *Con.*

§ 5 *con.* But exception. Trespass for breaking and entering the plt's. close, called the Fold-Yard, situated in the parish of ——, in the county of ——. Plea that the said close in the said count mentioned, and in which, &c. now is, and at said time when, &c. was the close, soil, and freehold of the said deft. C., wherefore, he, in his own right, and the other defts. as his servants, broke and entered the same, &c. Replication, that the said close was not the close, soil, and freehold of the said deft. C., as alleged. At the trial, proved the plt. was in possession of a close called the Fold-Yard, and that a trespass had been there committed; but it appeared that Crompton had, also, a close called the Fold-Yard in the same parish. Said for the defts. they had a right to apply all the evidence to C's. close &c. Held, the plt. was not driven to *new assign*, but could recover on proving a trespass done in a close in his possession named Fold-Yard, though the deft. C. had a close, as above; the deft. in his plea, should have given some further description of his close. He should have stated its abuttals. Holroyd, J. 1 Barn. & Cres. 489–491, Cocker *v.* Crompton and others.

Vol. V. Ch. 173. Art. 4. Con.

stated that in the rules of the king's bench, made in 1654, s. 12, it is said, 'for the avoiding of the common bar and new assignment, the declaration upon an original *quare clausum fregit*, may mention the place *certainly*, and so prevent the use and necessity of the common bar and new assignment,' and, sect. 16, 'the common bar and new assignment is to be foreborne where certainty is contained in the declaration equivalent to a new assignment.' As this may always be done, the common bar and new assignment are never necessary. See Remarks, sect. 10 11, and 12th, this article.

Art. 5. Con. 1 Pick. R. 122, 123.

§ 2. The public has only an *easement* in a turnpike road, and the owner of the soil may have trespass against an individual for ploughing up the road; otherwise if ploughed, for mending the road.

Art. 7. Con. 1 N. H. Rep. 251–253.

§ 7 *con.* In an action of false imprisonment, deft. justified under a warrant from the selectmen of a town, for the collection of taxes. Held, 1st. It is not necessary to allege in the plea, how the service of the warrant was completed: 2. Under the general replication of *de injuria sua*, &c. the plt. cannot give in evidence a previous arrest and discharge, under the same warrant, such matter must be replied specially. And, 2 W. Bl. 1165–1170, Sayr *v.* Rochford, same principle. On such replication, the plt. could not give in evidence tender and refusal of bail. H should have pleaded such matter specially, *absque tali causa*, and only puts the facts in the plea in issue, and any new matter must be replied specially.

Berry *v.* Cahanan, 2 Hals. 77—88.

In trespass, if the deft. by his plea, admit the case charged was a trespass in its nature, but stated certain concomitant circumstances, the law considers as an excuse or justification, the plt. may reply, *de injuria sua propria*, &c. but where deft. denies the thing or case charged to have been a trespass at all, for the close broken and goods taken were his property, or another's by whose authority he acted, there 'the plt. cannot reply *de injuria*, &c. but must, in his replication, traverse the right or interest set up in the plea; otherwise, it will be bad on demurrer: 2. A replication putting in issue several distinct facts, not tending to prove the same point is bad on demurrer.

Art. 9. Con. Brown *v.* Bennett, 5 Cowen, 181–186.

§ 42. Trespass, assault, and battery. 1. Plea not guilty. 2. *Son assault*, &c., replication de injuria, &c. 3. Plea very special; very special replication. Deft. waived his third plea, and went to trial on his other two. Held, 1. The special facts specially replied to, the third plea could not be admitted on *de injuria*, &c.; but they should have been specially replied. 2. *De injuria*, &c. takes issue merely upon the excuse in this instance, on *son assault*, &c. set up by the deft's. plea. 3. If the plt. have new facts or circumstances

justifying his own assault, in answer to the plea of son assault, &c., he ought to reply, setting them out specially, for he cannot give them in evidence under the general replication of *de injuria*, &c. As the plea of son assault was true, it is obvious, to meet it, the plt. in replying, should have gone back to his ground of justification; that is, his warrant, and the arrest he made, as constable, under, the warrant. The plt. was misled by the deft's. waiving his special plea at the trial to which the plt. had replied his warrant, arrest, &c. On this waiver the plt. had a clear right to amend if he had asked for it, and to have replied to *son assault*, &c. what he replied to the deft's. third special plea.

Vol. V. Ch. 173. *Art.* 9. *Con.*

§ 9. The plea of *liberum tenementum* admits the trespass and plt's. possession, and therefore, if the plea be not supported, the jury cannot find for the deft. Caruth *v.* Allen, 2 McCord, 226.

Art. 10. *Con.*

§ 10. In trespass to try titles, if the deft. show an elder grant, the plt. may do away its effect in reply, by proving an *adverse* possession.

2 McCord, 161.

§ 11. Trespass *vi et armis* for breaking and entering the plt's. close, and removing his fence. Held, the plt. might prove the loss of his crop to enhance the damages. This loss being the immediate and necessary consequence of the trespass.

Hardin *v.* Kennedy, 2 McCord, 277.

The plt. in trespass *to try title* must prove an actual trespass; and therein the deft. cannot, after recovery against him, in turn become plt. and support a second action *to try title*.

1 McCord, 466. 2 Nott & McCord, 528

CHAPTER CLXXIV.

GENERAL RULES IN PLEADINGS.

§ 11 *con.* But as to first default, the rule applies only where the prior pleadings are defective in *substance*, and not merely in *form*, and such as would be aided on a general demurrer.

Art. 1. *Con.*

1 McCord, 336.

§ 13 *con.* Every declaration for a tort must so describe the thing affected, as to enable the deft. clearly to see what answer he is to give. But in trover for the value of a slave, for instance, if the name be omitted, it is too late to object after verdict.

2 Nott & McCord 93, 96, Teague *v.* Griffin, 1 Ch. Pl. 362, 401.

§ 15 *con.* And 'after verdict those facts only are presumed to have been proved, which are either alleged in the declaration, or are so connected with the facts alleged as that the latter could not have been proved without proving the other also.'

Little *v.* Thompson, 2 Greenl. 228, 232; 1 D. & E. 141.

Vol. V. Ch. 174. *Art.* 1. *Con.*

§ 16 *con.* As the consideration and all parts of it must be proved, all must be stated in the declaration, whether entire or consisting of several things; if not, there will be a variance on which the plt. must fail. This rule does not include a *frivolous* part. Cited 3 Bos. & P. 113; 6 East. 568; 8 East. 8; 1 D. & E. 449; 3 Day's R. 315; and 1 Nott & M'Cord, 243–345, M'Daniel, adm'r. *v.* Tirrell. The law ever presumes damages on a breach of contract, but the plt., to recover special damages, must state, in his declaration, the contract; otherwise he will not be allowed to give evidence of it; and 5 Barn. & Cres. 589; 5 Barn. & Cres. 339.

1 Nott & McCord, 242, 243; Chitty on Pleadings, 256.

§ 18 *con.* Every plea is taken most strongly against the pleader. Hence, if the deft. plead he has been five years in quiet and peaceable possession, he must also state his possession was *adverse* and *actual;* but he may plead *de novo* or amend by leave, paying costs. Justices Nott and Cheves concurred, on the ground, that the plea did not state the deft had five years' possession *after* the plt's. right of action accrued; material for the deft. to bring himself within the South Carolina statute of limitations.

1 Nott & McCord, 85, 86; 1 Bl. Com. 366; Chitty, 222; Dyer, 304; 6 Johns. R. 291.

§ 27 *con.* The court allowed the plt. to prove by a lawyer of Louisiana, as a witness, that by the laws of that State the wife could legally contract with her husband for such property as she held in her paraphernal right, and that by them she could lend it to him to have the use of it, &c., though objected to on the ground that it was to prove the laws of a foreign country by parol. See Church *v.* Hubbard, &c. Quere as to the propriety of one State in our Union calling another in it a *foreign* State or country.

Dougherty *v.* Snyder, 15 Serg. & R. 84.

§ 39. Where a verbal contract has been made in lieu of one in writing, in declaring on the last contract, it is not necessary to recite the first.

Wilkins *v.* Duncan, 2 Litt. 170.

§ 40. If a fact not essential to the cause of action is averred, and is also so blended in the declaration with the plt's. right, that it cannot be struck out without affecting an essential part, the fact so averred must be proved.

McGee *v.* Donaphan, 2 Litt. 189.

§ 41. A plea answering one breach, however fit for the purpose of denying or avoiding that breach, cannot be pleaded to the whole action. And a plea in bar to the whole action, when the matter stated only bars a part, is bad; and a plea, to be good, must aver and state the matter of it so exactly as to enable the plt. to contest it successfully, if in his power.

Muldron *v.* McCleland, 1 Litt. 5.

3 Marsh. 33.

3 Marsh. 32

CHAPTER CLXXV.

RULES AND CASES IN DECLARATIONS.

§ 26. By an act of Congress of July 22, 1813, it is enacted, whenever there shall be several actions, or processes against persons who may be legally joined in one action or process, as to any demand, or matter in dispute, before a court of the United States or territories, and judgment for the plt., he has but one bill of costs, unless special reasons be given on motion in open court for bringing several actions or processes. Same principle as to libels against vessel and cargo, and also the federal courts are empowered to make rules to prevent unnecessary costs.

§ 27. The owners of a privateer may alone sue for the whole prize, and recover. Need not join the master and crew. Ch. 227, sec. 24, &c., Cabot's case.

Same principle as to whaling voyages, in which the crews have shares instead of wages. 3 Pick. 434, 441.

§ 28. *Joint defts., where one must sue alone.* As where the goods of one of *joint* debtors are taken in execution and wasted; the owner of the goods must sue alone, and not all the debtors jointly. 2. If the officer extort illegal fees from one of the debtors, he alone must sue. This case is unlike those of Weller and al. *v.* Baker, 2 Wils. 423; 2 Saund. 115; Osborne and al. *v.* Harper, ch. 42, a. 3, s. 6. 2 Greenl. 117, 119, Ulmer & al. *v.* Cunningham.

§ 29. Writ of right. Held coheirs under the statute of descents are tenants in common, and though they may join in a real action, pursuant to statute, they are not compellable to join, but may bring several actions for their respective shares or interests. 2. When a statute says, one *shall or may* do an act for his benefit, he has an election to do it or not. The statute empowered them all to join the common law to sever; and the words *shall* or *may* seem to have left them to take either course, *aliter* had the words '*or may*' been omitted in the acts. Judgment for the demandant. Malcom *v.* Rogers, 5 Cowen, 188, 196. 2. R. L. 52. 1 R. L. 90, s. 2.

§ 19. Debt or covenant for rent by lessor against lessee, is on *contract* and *transitory*. 3 Serg. & R. 502. ART. 6. *Con.*

So is covenant by the assignee of the reversion, on 22 H. 1, 34. But debt at common law, by such assignee of the reversion, is on privity of *estate* and local, id. Case for use and occupation may be brought in Pennsylvania, as to lands in another State, id. As to changing the venue, 1 Cowen, 47–48.

§ 3. The suing out of a writ is presumed to be at its date, and not its service. When a plt. lives within the State, and ART. 7. *Con.* 2 N. H. Rep. 227, 552.

VOL. V. CH. 175. *Art.* 7. *Con.*

dies pending the action, the endorser of the writ is thereby discharged. In this case the administratrix of the original plt. came in and prosecuted, and the original deft., Eaton, now plt., recovered judgment against her for his costs, taxed at $100,72. Sued his execution against her, *non est*, &c., returned, now sues S, who endorsed the first writ.

ART. 8. *Con.*

4 Pick. 405—416, Merchants Bank v. Cook.

§ 10 *con.* Held, in an action brought against a bank, the writ may be served by a deputy sheriff, who was a member of the corporation: 2. He was not a party to the writ, within the meaning of stat. 1783, ch. 43, and the service is valid. The court considered the word *party* in a *technical* sense, meaning 'the *party plt., or deft.*,' on the record, 'and all others who may be affected by the writ, indirectly, or consequentially, are persons interested, but not parties.'

§ 20 *con.* Sunday is not one of the three days for which an officer may adjourn the sale of an equity of redemption taken on execution. 4 Pick. 354–357.

ART. 9. *Con.*

16 Mass. R. 74.

§ 3 *con.* A writ of error need not be endorsed. If an erroneous judgment be given against the client, it is the duty of his attorney, on record, to sue a writ of error without special authority. Stat. 1784, ch. 28, s. 11, does not require judicial writs to be endorsed; but a *prochein ami* must endorse. 17 Mass. R. 222.

If the attorney endorse the writ, the remedy against him is by *scire facias*, and not debt, which never lies on a conditional or collateral undertaking. Mass. stat. 1784, ch. 28; Maine stat. 1821, ch. 59, s. 8. 2 Greenl. 128–130.

3 Greenl. 216–219, Clapp v. Balch.

§ 7. *con.* If an original writ be not endorsed, advantage thereof may be taken in abatement, by plea or motion; but it cannot avail the deft. after pleading in chief.

1 N. H. Rep. 336–338, Parsons v. Pearson.

§ 12 *con. Endorsement of writs in New Hampshire. Scire facias* against the deft. *as endorser* of an original writ, in a suit commenced by one Jesse Carr, an inhabitant of Vermont, against Parsons. Judgment for him for costs. Held, this *scire facias* is local, and confined to the county and court where the record of the judgment, in the former action, remains: 2. The endorser became liable, immediately, to pay Parsons his costs, and before execution sued on the judgment, *scire facias* was suable against him, because Carr, the original plt., was an inhabitant of another State. Stat. of February 9, 1791. When the original plt. is an inhabitant of the State, and the deft. recovers costs against him, execution must issue against him, and *non est inventus* be returned, before his endorser is liable.

1 N. H. Rep. 358—362.

The endorser is not liable for costs recovered by the deft., of the return of *non est inventus* on the execution, be made and dated before the return day. N. H. Laws, 100, statute

September, 1792, s. 7. This *scire facias* must be sued within one year from the time of rendering judgment against the plt., and not afterwards. VOL. V. CH. 175. *Art.* 10.

§ 5 *con.* A deputy sheriff returned a writ with a minute only of the time and manner of service, the court permitted him to make a full return, after out of office. 1 Pick. R. 461. *Con.*

§ 24 *con.* The rule to discontinue on receiving an insolvent discharge, is not a rule of course: 2. A motion to stay proceedings till the costs in a former action be paid, is too late after judgment perfected, though the nonsuit be on the merits. ART. 11. *Con.* 2 Cowen, 593. 1 Pick. R. 371.

§ 29 *con.* In actions *ex delicto* where there are several defts., the plt. may enter a *nolle prosequi* as to one. 1 Nott. & Mc Cord, 353.

§ 30 *con.* Where a motion is made for judgment as in case of a nonsuit, all the defts. must join in the motion, and if one or more of them cannot join in it, as if one be defaulted, &c., the motion will be denied as to all, for the plt. cannot be nonsuited as to one deft., and retain his action as to another. 2 Cowen, 295.

§ 31 *con.* The circuit judge suspended the trial of a cause on the plt's. counsel suggesting it would be a long one, and afterwards the business took such a turn that the cause could not be tried that circuit; a motion for judgment, as in case of nonsuit, was denied without costs. 2 Cowen, 511–512.

§ 32 *con.* The plt. may be nonsuited as to his general counts only, leaving him to proceed on his special count, for not furnishing a bill of particulars. The court will not hear a motion to set aside a nonsuit, at the trial, the plt. having since died; the only effect being merely to unsettle the question of costs. Symonds *v.* Crow, 5 Cowen, 279–280.

§ 25. The plt. cannot become nonsuit after the cause is opened to the jury, but by leave of court. 16 Mass. R. 317. ART. 12. *Con.*

§ 26. *Where the court can order a nonsuit.* As where on trial of an issue of fact, the plt's. evidence not opposed by the deft. is not sufficient to maintain the action, the court may nonsuit the plt.; and this is no infringement of the bill of rights. See s. 20, which secures the jury trial. Nor does it in the court below, abridge the right of appeal, secured by stat. 1822, ch. 193, s. 4. Such order being subject to revision in the supreme judicial court, by a bill of exceptions in the nature of appeal, by the same stat. s. 5. 3 Greenl. 97–102, Berley *v.* Little; see s. 12, this article; 2 Greenl. 255. The people never nonsuited, 3 Cowen, 16.

§ 27. A cause is tried on notice, and the jury is discharged because they cannot agree; the cause is put on the calendar for another trial; the plt. refused to bring it forward for trial that sittings, &c. Held, the deft. is not entitled to judgment as in case of nonsuit. Nor can the plt. be nonsuited when all issue in law is undecided. 15 Johns. R. 398. Fisher *v.* Dale, 17 Johns. R. 342.

Vol. V. Ch. 175. *Art.* 12. *Con.*

§ 28. Motion for judgment as in case of nonsuit for not going to trial. Held, one of several defts. cannot move for such a judgment, though they have severed in their pleas. *Aliter*, if the plt. declares against but one. Severing in their pleas, does not alter the case. Nonsuit puts the plt. out of court, of course, as to all the defts., s. 8. Jackson *v.* Wakeman & al. 1 Cowen, 177–178.

Art. 14. *Con.*

§ 2 *con.* When the court has jurisdiction, its power to order a default entered, 'is derived from the consent of the party.' 2 Greenl. 255–257.

4 Cowen, 549.

§ 11 *con.* In replevin the writ was against the defts. by their true names of David and *Alexander*. Default for want of a plea. This set aside for variance between the writ and count, in the christian name of one of the defts., the writ being *Alexander*, and the count *Andrew*. Many cases cited.

Art. 16. *Con.*

§ 1 *con.* *Nil dicit* in the plea in an action of debt on a judgment recovered before a justice of the peace, in another

2 Pick. R. 148.

State—The act of congress of 1790, as to State records, does not extend to the courts of justices of the peace.

Art. 18. *Con.*

§ 14 *con.* Debt on an administration bond. Special endorsement of the writ; so the endorser's action. Held, in an

5 Pick. 61–63, Coffin, Judge, &c. *v.* Jones.

action originally commenced in the supreme judicial court, a plea in abatement, after a general imparlance, is bad; and while the endorsement remains, the judge cannot pursue the action, though the endorser fails to prove his right.

CHAPTER CLXXVI.

PLEADINGS. ABATEMENT.

Art. 1. *Con.*

§ 4 *con.* The provision in said act of July 8, 1782, as to pleas in abatement, is repealed; and the rule of that court

3 Pick. 512—516, Thompson & al. *v.* Hatch & al.

that such pleas 'may be filed at any time during the first four days of the return term, and not afterwards,' is valid by virtue of the stat. 1820, ch. 79, s. 7 : 2. So long as a rule of court remains in force, it is error to dispense with it, in a particular case; hence a plea in abatement, filed the fifth day of the return term, cannot be admitted by the judge to be as of the fourth.

1 McCord, 568.

§ 20 *con.* A bond in suit was given to a *treasurer;* the plt. suing it, stated he was his successor. If the deft. deny the plt. is successor, he must do it by a plea in abatement.

Const. R. Treadway's Ed. 157.

If the surviving obligor of a *joint* bond, be out of the State, a plea in abatement is good in an action against the *administrators* of the deceased obligor. And 1 McCord, 82, all the parties to a *joint* contract must be sued, though the officer re-

turn *non est inventus*, as to one, and that he has left the State, and these facts appear on the declaration, a plea in abatement for a *nonjoinder* is good. But though only the names of the *surviving* copartners be stated in the writ, yet if all be named in the declaration, it is good, as the declaration is an enlargement of the original writ. 2 Bay, 543.

§ 11 *con.* Two make a *joint* promise; A, one of them, never having his domicil, or any property in the State where sued, a *separate* action lies against the other, B, and a judgment against him in another State, not satisfied, is no bar to an action against B, on the original promise. Both sued in both States, but a service on one only, in each; judgment against the other, alone, on the principle in Norcross *v.* Hallowell and Whipple. 2 Greenl. 191–194.

§ 21 *con.* In all cases of appeals from the court of common pleas to this court, it may revise and correct any proceedings in that court, when the defect appears of record; even to correct its construction of its own rules: 2. If that court deprive the deft. of the benefit of his plea in abatement, he may file the same in this court, and the plt. must answer it. 4 Pick. 89–93. Rathbone *v.* Rathbone.

§ 34. Held, 1. The courts of the United States have jurisdiction of suits by or against executors or administrators, citizens of different States, &c. though their testators or intestates might not have been entitled to succor, to sue or liable to be sued in those courts: 2. A declaration averring that '*J. C. by his agent A. C. made*,' the note, &c. is good: 3. A general profert of letters testamentary, is sufficient, and if the deft. would object to their insufficiency, he must crave oyer, or that the plts. are not executors, he must plead in abatement: 4. Debt against an executor is in the *detinet* only, except in a case of waste: 5. Debt lies on a promissory note against executors: 6. No wager of law in the U. States, if it ever existed here: 7. In such case not necessary, generally, to state in the declaration, the names of the persons composing the firm: decided on special demurrer. 8 Wheat. 642–673, Childress, executor, plt. in error, *v.* Emory and McCleur, executors of John G. Comegys, surviving partner, of Wm. Cochran & Comegys, defts.

§ 35. It is not necessary to aver on the record that the deft. was an inhabitant of the district, or found therein at the time of serving the writ; and where the deft. appears without excepting to the service, it is an admission, it is regular, and he waives any exception he may have to it. 8 Wheat. 699–700.

9 Wheat. 537–540, as to endorsed notes. See ch. 187, a. 3, s. 4.

§ 36. The joinder of improper parties, as citizens of the same State, &c. will not affect the jurisdiction of the circuit courts in *equity*, as between the parties properly before the courts, if a decree can be pronounced as between the parties 10 Wheat. 181–192, Banks *v.* Carneal.

Vol. V. Ch. 176. Art. 3. Con.

who are citizens of the same State; and see 12 Wheat. 193–199, Mallow *v.* Hinde.

§ 37. A *feme sole* is sued and marries pending the suit. This need not be noticed on the subsequent proceedings, and it is improper to treat the husband as a party. But if a notice state *Harriet Fulton* now *Harriet Dale*, &c. this is mere description, and the words now Harriet Dale, are but *surplusage*. Though the husband is not a party on the record he is one in interest, and on *scire facias* may be one on record and subject to execution. Hence he may make his affidavit, &c.

Roosiverlt v. Dale, executrix of Fulton, 2 Cowen, 561–564.

Art. 4. Con.

§ 9 *con.* If husband and wife sue in a real action in her right, and pending it she dies, he cannot proceed for his estate by the *curtesy*, by stat. 1822, ch. 186, but though writ abates, 2 Greenl. 127, no cost, the death being the act of God. Gilm. 145, 2 Rand. 454, Drago *v.* Stead & al.

Mass. Act, March 3, 1829, provides that if a feme sole pl t. &c. marries pending the suit, her husband may become a party on motion.

§ 11 *con.* A person convicted of felony, and sentenced to the State Prison for life, under the statute of 1799, is *civiliter mortuus*; hence a writ of *scire facias* issued to such convict, and not to his legal representatives or terre-tenant to revive a judgment, is erroneous: 2. Where a person was convicted and sentenced before March 29, 1799, he was not *civiliter mortuus*, so his estate was not divested. Platner *v.* Sherwood, 6 John. Ch. R. 118.

Troup v. Wood. 4 John. Ch. R. 247.

Art. 6. Con.

§ 8 *con.* 1 Pick. R. 388, Commonwealth *v.* Perkins. He was indicted by the name of *Thomas Perkins, Jr.* for a nuisance in gaming, &c. Plea in abatement at April Term, 1822. Municipal Court that his name was *Thomas Hopkins Perkins*. On general demurrer, held, a misnomer in the Supreme Court; the court said Junior was no part of the name, but said there is another objection, the deft. is called *Thomas* instead of *Thomas Hopkins*. Cited 5 D. & E. 195; attorney general cited 5 Johns. R. 84; 10 Mass. R. 205; 1 Keb. 885, Vin. Abr. Misnomer, (C. 6.) 5, 6—for deft. Vin. Abr. Misnomer, (C. 6.) 1 Camp. 479; 5 D. & E. 195; 1 Chit. Cr. Law, 202; 6 Mod. 185: 10 Mod. 208. However inconvenient the double christian name is, it seems it must be used. Held, a person can have but one christian name; hence, when a person was named Cornelius V. S. Roosevelt. Held, no objection the V. S. were omitted. Further cases as to misnomer—3 D. & E. 611–660; 10 East. 328; 11 id. 225; 15 id. 159; 1 B. & P. 645. See Murray *v.* Hubbart, ch. 194, a. 4, s. 13; 6 Taunt. 115; 3 East, 167; 1 Chit. Pl. 250; 2 id. 458–462; 10 East, 83; 12 Johns. R. 154, Redman *v.* Russell; 3 M. & S. 450; 1 Dunl. Pr. 175–237.

2 Cowen, 463–464.

§ 32 *con.* Misnomer must be pleaded in abatement, if the party have opportunity to do it, and if he omits it, he may be concluded. If on process against A, B is arrested, B may immediately have trespass for false imprisonment, as 6 Cowen, 456–464, *Daniel S.* Griswold *v.* Sedgwick and others. Trespass, false imprisonment. Plt. was arrested on process out of the circuit court of the United States against *Samuel* S. Griswold. Held, the marshal and solicitors concerned were liable, though the person arrested was the one intended, and he was immediately after the arrest, discharged. The rule stated was that if process against the body out of any court do not, on the face of it, authorize an arrest, it is void, and will not protect any person concerned in the arrest, even the officer to whom directed: 2. Otherwise of an execution against one, by a wrong name, who appears in the suit, and omits to plead the misnomer in abatement: 3. One superior court of law or equity does not inquire if the proceedings of another be irregular or not. Several cases cited by the court—Cote *v.* Henson and others; 6 D. & E. 234; 8 East. 328; 2 Taunt. 400; 1 Bos. & P. 647; 2 Stra. 1218; 3 Caines, 267. Vol. V. Cr. 176 *Art.* 6. *Con.*

§ 35 *con.* No cause of abatement if the deft's. name is spelt differently from his usual manner of spelling it, if the two ways of spelling have the same sound. In the writ Jacob Kiah; called Jacob Carrier: six ways of spelling Allen. 2 N. H. Rep. 557—559.

Deft. sued by a wrong name may plead it in abatement, (and by a rule, Feb. term, 1825, must ever do it,) after he has appeared and given notice thereof specially. Many cases cited; and also to shew the court, where he moves *before* appearance, will set aside the *capias*, and after proceedings for irregularity. 4 Cowen, 148–157, Mann *v.* Carley; Chapin *v.* Carley. 1 M. & S. 360; 2 Taunt. 399, &c.

Deft's. death in a real action abates the writ without having appeared, and it cannot be revived against his heirs; and if so done, it is error, &c. The plts. in error were defaulted below in a writ of right, and judgment against them in the lower court in Kentucky. The 31st section of the judiciary act of 1789, ch. 20, is confined to *personal* actions. 7 Wheat. 426–433, Martin's heirs *v.* Thomas.

§ 11. It is a good plea in abatement of a writ, that the deft. was arrested when privileged from arrest; this was his attendance at a town meeting as a voter for the electors of President and Vice President of the U. States. 2 N. H. Rep. 468–470; Was on Statute, June 23, 1813, s. 5; 2 H. Bl. 300; 13 Mass. R. 324; 3 Burr. 1595; 12 John. 178; 18 do. 52. Art. 7. *Con.*

§ 2 *con.* Was a suit on a policy of insurance against the defts. a corporation created in *Connecticut*, brought in the circuit court in *New Hampshire*. The corporation entered a general appearance. Held, thereby, the objection to the service under the 11th section of the judiciary act of Sept. 24, 1789, ch. 20, was waived, the objection must have abated the action had it been pleaded in season. Art. 9. *Con.* 3 Mason, 158, Flanders *v.* Ætna Ins. Company.

VOL. V. CH. 176. *Art.* 9. *Con.*

Appearance for the purpose of objecting to the return of a writ is not a waiver of the defect. This is the true destination. 1 Cowen, 1–13.

If when a writ is served there is no count or declaration in it, this may be pleaded in abatement, the declaration 'is a necessary part of the writ, and, therefore, a plea in abatement may conclude with a prayer of judgment of the writ,' without it there can be no arrest or attachmennt; to add it after service is to *make*, not to amend; nor can a count be added afterwards by the deft's. consent if this is to affect third persons.

2 Pick. R. 421.

11 Wheat. 280 303.

§ 4 *con. Variance* between the writ and declaration cannot be taken advantage of in the court below, after plea pleaded: and *quere*, whether by modern practice such variance can be taken advantage of at all.

§ 10. 2 Pick. R. 592–597, Ripley, ex'r., *v.* Warren, adm'r., held, the test of a writ is matter of form, and if not attested as is required in the constitution, the defect must be pleaded in abatement, and if not, it is too late to object after joinder in demurrer. Court cited 3 Mass. R. 195; 7 do. 209–463; 16 Johns. R. 145; 1 Caines, R. 154; 5 Burr. 2586.

5 Pick. 221–223, Rathbone *v.* Rathbone.

§ 16. Debt: plea in abatement that the writ, 'at the time it was put into the officer's hands for service, and at the time when it was served, by attaching the property of the said Samuel, contained no count or declaration; nor was there any cause of action in any way or manner set forth.' Special demurrer to this plea: five causes assigned: plea adjudged good: plea had been better if it had only stated when the writ was served: there was no cause of action contained in it.

ART. 12. *Con.*

§ 6. 1. If a person be sued in a writ of entry for premises, in which he claims no interest whatever, he must file his disclaimer: 2. If he claims in them an estate less than a freehold, he must plead *non tenure*, specially.

2 N. H. Rep. 9, Mills *v.* Pierce.

Jackson, ex dem. Ten Eych, and Ann his wife, *v.* Richards, 6 Cowen, 617–27.

§ 31. *Declaimer by deed,—disagreement, &c.* Ejectment for a part of land called H. The plts. deduced title to an undivided half to said Ann, by descent from her father M. Vischer. He died in 1793; the deft. to show a title out of Ann, the plt., gave in evidence conveyance of the premises, &c., from her, while sole, and her coheir, Sebastian Vischer, to their mother, Lydia Vischer in fee, dated March 13, 1800: this proof was by an exemplified copy of the conveyance from the secretary's office. The plt. in answer, read in evidence, an instrument, dated Oct. 13, 1824, attached to the conveyance of Ann, &c., to Lydia, and executed by her, by which she certified, that the conveyance from Ann, &c., was never executed and delivered to her, or agreed to be executed and delivered to her by the grantors, or either of them; and that she had never seen or had the possession of it, or done any act signifying her

assent to take the estate conveyed by it; and she thereby declared her dissent, and that the conveyance was void, &c. Her said instrument was acknowledged the 12th, and recorded the 14th of October, in the secretary's office, 1824: there was no other proof of its execution. It was objected to, but received, subject to the opinion of the court. Verdict for the plt. Held, 1. A deed to be valid must be delivered and accepted: 2. That the act of non acceptance cannot be shown by the written declaration of the grantee, especially where third persons were interested in maintaining or defeating the deed; but must be proved like other facts, by disinterested witnesses under oath: hence, 3. The mother's certificate was of no avail, she should have been produced as a witness: 4. It is essential to a *valid disclaimer*, that the case be such, that the estate, or thing disclaimed, or disagreed to, or waived, would pass or vest, but for the *disclaimer*, unless it be made an express condition of the grant, that the grantee shall elect: 5. A deed drawn and sealed, of land, but not delivered, is void, and not a case for disclaimer on the part of the grantee: 6. Hence, a written instrument in such case being put on that ground, not affecting the title to lands in any way, is not an instrument which can be acknowledged or proved, and recorded within the registry act, 1 R. L. 369: 7. When a large tract of land is divided into lots, the adverse possession of one is not that of the other. New trial granted: sundry cases of disclaimers by deed, &c., were cited by the court. Vin. Abr. Disagreement, A. Pl. 2, and Pl. 4, Pl. 5. In these cases, a grant or gift to one in remainder, or in his absence, is good till he disclaims or disagrees. If he agrees, it is his *ab initio;* but if he disclaims, it is never his; Pl. 10, so where four men were enfeoffed, and seisin was delivered to three only, but in the name of all: the fourth comes and views the land, and *by parol, disagrees to it*, this does not devest the freehold out of him, but the tenancy remains in all, until disagreement in a court of record; Pl. 14, Pl. 18; Vin. Abr. Disclaimer, C. Pl. 1, 2, 3, 4, 5,; Vin. Abr. Waiver, B. Pl. 2; 1 Inst. 23. In Cruise's Dig. tit. 32, Deed, s. 1, 'in case of a deed poll, the *grantee may disclaim the estate intended to be given to him, in which case no estate will vest in him.*' See the case of Butler *v.* Baker, 3 Coke, 25, 26, 27; much law on this subject; 2 N. H. Rep. 416.

Vol. VI. Ch. 177. Art. 7. Con.

CHAPTER CLXXVII.

GENERAL PLEADINGS, OYER, &c.

§ 9. Though a party pleading with a *protestando*, saves himself, being concluded in *another suit*, from traversing the fact alleged in that, and not traversed or denied, but noticed only *protestando*, yet in that suit, the party cannot, by his protestation, put his adversary to prove the fact, but the court must, for the time, take it as admitted.

Richards v. Allen, 1 Bibb, 189.

Art. 3. *Con.*

§ 9 *con.* A promises to deliver specific articles to B, on demand, a demand at A's dwellinghouse, in his absence, is sufficient to charge him with the price of the articles.

16 Mass. R. 453.

What is reasonable time; 2 Greenl. 249–254: this is a question of law.

Where one is bound to perform a contract on demand, no demand is necessary where he has disabled himself to perform: as if a bailee promise to deliver a watch, *on demand*, to the owner, but disables himself to do so by giving it up to a third person: nor is one bound to perform or regard a demand made on Sunday: see *Sunday* in the index: as to disabling, &c., see ch. 75, a. 13, s. 11, ch. 111, a. 7; cases.

Delamater v. Miller, 1 Cowen, 75.

Reasonable time. A has a bond and mortgage, and assigns them to B, who promises to pay the money due thereon, to A, when collected by due course of law. B's promise is broken if he suffer a term to elapse, after the money is due, without suing for it, and especially when directed by A to proceed in the collection. B was bound to proceed in *reasonable time*, as no particular time was appointed. This is a common case; the creditor employs an attorney, or agent, or assignee, to collect his debt, and pay the money to him when collected, intending in due course of law, and there is usually an implied or express direction to proceed in the collection; and there is an implied, in the absence of an express promise, by the attorney, &c., to perform *in reasonable time*, and if suing, be necessary, to proproceed as expeditiously as the law will enable him to do.

1 Cowen, 98 —99.

Art. 9. *Con.*

§ 20. A sold goods to B, on condition he should give a note for the price, with a sufficient endorser. B took away the goods, without objection from A; but his clerk told B, that if an endorser named by him, should not be satisfactory, he must furnish another. This he failed to do, on the rejection of the one named. Held, the property remained A's.

4 Pick. 449, Whitwell & al. v. Vincent.

A sold goods to B, on credit, B agreeing to give certain bills of exchange. The goods were afterwards put on board a vessel by B's order, without any objection on A's part, that the condition of sale was not complied with. Held, A waived, and the condition and the goods were liable to attachment as B's

4 Pick. 516, 517.

property. Carlton & al. *v.* Sumner, a deputy sheriff who attached them as B's property. A brought replevin. The court observed, that this case was settled by that of Hussey *v.* Thornton, 4 Mass. R. 405. The facts, said the court, are similar, 'except that there the goods were not in fact delivered, but held for the performance of the condition of the sale; there the contract of sale was complete, and the goods were delivered without any condition expressed or implied, wherefore, the vendor could not reclaim them.' Vol. VI. Ch. 177. *Art.* 9. *Con.*

§ 22. Place of notice, &c. If an attorney board in one house, and keep his office in another, when absent has no one to attend his office, the place for giving him notice is where he boards. Art. 11. *Con.* 2 Cowen, 484, 485.

§ 23. A note payable in specific articles, without mentioning day or place, is, in law, payable on demand; and a special demand is necessary. If payable in *farm produce*, must be demanded at the farm of the debtor; if in *merchandise* or *manufactures*, at the store of the merchant, or the shop of the manufacturer. Against the demand were cited 5 Johns. 119; 7 id. 461; for the demand, Chipm. on Con. 25, 28, 30, 35, 49; Smith *v.* Levenworth, 1 Root 209; Bach *v.* Owen, 5 D. & E. 409; 6 Mass. R. 453; 2 Bibb's Kentucky Rep. 280. Lobdell *v.* Hopkins, 5 Cowen, 516—518.

§ 20. A plea *since the last continuance* amounts to a waiver of all former pleas, and admits all the facts in the declaration. 1 Hayw. 96. The court does not permit this plea to be put in at the trial, without being satisfied of the truth of it. Id. 180. And may impose terms on the party entering the plea. Id. 364. Art. 12. *Con.*

§ 21. If a deft. have no opportunity to plead his discharge under the insolvent act, *puis darrein continuance*, the court will relieve him on motion: 2. The last continuance is the last day of the term of the return of the *venire facias:* 3. A plea *puis darrein*, &c. cannot be interposed after a verdict, or a *relicta* and *cognovit*, given by the deft., which is equivalent to a verdict for the purpose of the present question. Palmer *v.* Hutchins, 1 Cowen, 42–44, and cases cited.

§ 22. Matter arising after issue joined must be pleaded *puis darrein continuance:* 2. This rule holds also in ejectment: 3. The sheriff's sale was before the action was commenced, but his deed after issue joined. Held, this deed was in evidence on the general issue, as it related back to the sale, and in judgment of law was executed at the time of the sale, though that was four years before: 4. When several acts are necessary to constitute a title, the original act is preferred and to this the other acts have relation. Jackson *v.* Ramsay, 8 Cowen, 75–81. Not maintenance to complete a title *pen-*

Vol. VI. Ch. 177. Art. 12. Con.

dente lite. 8 Johns. 479. Matter arising since the last continuance must be pleaded, *puis*, &c. Cited Bul. N. P. 309; 1 Selw. N. P. 147; 1 Chit. Pl. 532, 635; Tid. 773; 5 Bac. Abr. 477, 6th ed.; 3 Bl. Com. 317; 11 Johns. 424; 13 id. 157; 3 Caines R. 173; 2 Chit. Pl. 677; 2 Dunl. 622. So in ejectment. 7 Johns. 194; 19 id. 168. As to *relation back*, the main point, Jackson *v.* Catlin, 2 Johns. R. 248; 8 id. 479–520; 2 Caines R. 61; 1 Johns. Cas. 85; 2 East, 256; 1 Johns. Cas. 81, 85; 3 Caines Cas. 262; 4 Johns. R. 234.

Jackson v. Peer, 4 Cowen, 418–420.

§ 23. Trespass for mesne profits. Held, 1. A plea *puis*, &c. may in general be pleaded, though not verified by affidavit: 2. The deft. may enter a rule of course to amend such plea as in other cases: 3. So he may enter a rule of course to reply, or that the plt. be nonsuited: 4. Under such rule to amend his plea, the deft. may alter, so as to modify, or vary entirely the ground of defence, taken by his original plea. The court saw no objection to all this, though twelve authorities were cited to the *contra*. This is one instance among thousands to show how to little purpose a dozen authorities or cases may be cited in the present state of our law books.

CHAPTER CLXXVIII

PLEAS IN BAR.

Art. 13. Con.

§ 11. And as the assignment of dower need not be by deed or instrument in writing, hence need not be pleaded to be so made. 1 Pick. R. 189–191, Conant *v.* Little.

§ 12. But the party has no view in Massachusetts, as is allowed in England. No writ of view here sued out. See Mass. stat. 1807, c. 140, s. 8, also.

Art. 14. Con.

§ 1 *con.* 19 Johns. 325, how tenant gives notice. 2 Cowen, 594, 595: one claiming in opposition to the tenant's title cannot be admitted deft. with him in ejectment. P. 585: to entitle the tenant to enter into a special consent rule in ejectment, as tenant in common, he must, at least, swear he claims as tenant in common; that he believes the action will involve a question between tenants in common, is not sufficient. So, p. 595, if the tenant claim a part as one tenant in common and B claims the whole, his claim is hostile to the tenant's title, hence B cannot be so admitted, 596, 597. Cases of practice, &c. in ejectment, 2 Cowen, 602–604, in notes, &c.

3 Cowen, 356. Where two tenants are sued jointly in ejectment, the consent rule must be in the name of both. Several demises added, paying costs, it appearing the lessors had a subsisting title.

Id.

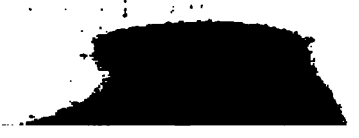
1 Cowen, 134: the landlord will not be permitted to defend alone; nor till the tenant refuses or neglects to appear, and this is to be stated in the affidavit for the motion admitted to defend jointly; and 19 Johns. R. 325; and 1 Cowen, 134–136. Pages 138, 139, where the court will order the second ejectment stayed till costs be paid in the first, as if the same title to the same premises being in question in the second as in the first suit, and between parties or privies in the first. Done on motion, also, pages 140, 141.

§ 2 *con.* Confession of lease entry and ouster, in ejectment, extends only to an entry to complete the title of an action; but not to an entry necessary to revest the possession. 1 Har. & Mc H. 273, Holt *v.* Smith.

Ejectment is almost the only action for trying title to lands in *Pennsylvania*. 1 Dall. 67. Lies only for things whereof the sheriff can deliver possession. 2 Yeates, 331. Nor, it seems, to recover a legacy charged on land. 4 Serg. & R. 509. No other plea in ejectment than not guilty can be pleaded. 3 Serg. & R. 409. Need not plead the act of limitations. Id. Statutes, March 21, 1806, and April 13, 1807, respect ejectment. Id. Plt. recovers on the strength of his own title. 3 Serg. & R. 288. May recover part sued for. 6 Binn. 36.

§ 7 *con.* This was a writ of entry. The demandant counts on her own seisin, within thirty years, of the whole, and disseisin by the tenant. Plea, *nul disseisin*. She proved title to a sixth part, as one of six heirs of Jos. Dewey, and recovered the sixth part; also held, if she had proved seisin of the whole, and had not proved her title to a part, she must have recovered the whole, the tenant showing no title. The tenant might have pleaded in abatement, the plt. was tenant in common. As he did not, he could not avail himself of it, without showing title, 'which he might do by disclaiming to hold otherwise than as tenant in common, as provided in statute 1795, c. 75.' Second point as to part, the demandant may recover less, but never more than he declares for. (See the word *Part* in the index, several cases.) The court cited Ablett *v.* Skinner, cited above; 2 Rol. Abr. 719, 704, ejectment for a messuage a part may be recovered. So where part of a building is a nusance. Id. (and Commonwealth *v.* Manning.) So Guy *v.* Rand, Cro. Eliz. 13, and Goodwin *v.* Blackman, 3 Liv. 334. If the plt. sue for the whole, and prove title to a fourth part, this he recovers. Cooper *v.* Frankling, 2 Rolle's R. 385; Denn *v.* Purvis & al. 1 Burr. 326. No difference between ejectment and writ of entry in our practice.

2 Pick. R. 387–392, Dewey *v.* Brown, Jr.



Vol. VI. Ch. 178. Art. 14. Con.

A declaration in ejectment, stating that the lessor jointly and severally demised, is supported by proving a tenancy in common; 3 Litt. 266, and 1 Hawks, 469, tenants in common may recover on a joint demise.

Judgment in ejectment for the term, damages and costs cannot be revived by *scire facias* against the heirs alone, the personal representatives must be made defts., also surviving parties, &c.

Mitchel v. Smith, 1 Litt. 244.

Waterhouse v. White, 2 Ten. Rep. 334.

Mere possessor, sued in ejectment, is not allowed to go into evidence to show a mesne conveyance, under which the plt. claims, was forged. The conveyance being proved and recorded.

2 Rand. 353–363.

§ 15 *con.* A demise being laid in ejectment before the title of the lessor of the plt. accrued cannot be taken advantage after issue joined: 2. In Virginia the record of an action of ejectment is not conclusive evidence of the date of the demise, in an action for *mesne profits*, though conclusive as to the title: 3. Land revested in the State for non payment of quit rents, cannot be taken up as waste and unappropriated land, on a land office treasury warrant, but may be acquired by petition.

4 Serg. & R. 130.

A plt. in ejectment, under the acts of 1806, 1807, may recover nominal damages and full costs, though pending the action he has conveyed the title to a third person. By the act of April 13, 1807, two verdicts in ejectment on the same side and judgment thereon are conclusive.

Before trial the plt. may amend his declaration, by enlarging the term, or adding a new demise, paying costs. Lion v. Burtis, 18 Johns. R. 510.

Where the deft. means to defend, as *tenant in common* with the plt's. lessors, on the ground there has been no ouster of the cotenant, he must apply to the court, on affidavit, for leave to enter into the consent rule, specially stipulating to confess *lease* and *entry* only, not *ouster*, unless an actual ouster of the lessors should be proved at the trial.

Jackson v. Lion, 18 Johns. R. 398.

Jackson v. Davenport, 18 Johns. R. 295.

When the lessor's title for life ends before the trial of the cause, the plt., though he cannot turn the deft. out of possession, is entitled to judgment so as to enable him to recover the *mesne profits*, but with a perpetual stay of the writ of possession.

§ 24. In *South Carolina* the legislature in February 1791, provided for trying titles in trespass, in which the parties are named, in all the proceedings; and declared this action should be as effectual to try titles to lands as the former action of ejectment had been; that the jury should have power to assess damages, for *mesne* profits, in the same action; and on the

plt's. entering judgment, on any verdict in his favor, he should, in addition to his damages, have a writ of possession. In all other respects to have the same effect as a recovery would have in the former action of ejectment. If the plt. fail in his first action, he may have a second, if commenced in two years. There must be some injury; plt. may go on all his titles and recover on one. If he has title, entry gives sufficient possession, but if he relies wholly on possession, this must be a *possessio pedis*. Possession of part, is of all the title covers. 1 Nott. & McCord, 357–369: 2 Bay, 115–421–474; 1 Mc Cord, 466; 1 Nott. & McCord, 207–210–369–381.

§ 25. *How adverse possession is confined.* Ejectment for one acre and one half acre of land. Held, 1. The defence of twenty years' possession to countervail a legal title, must be supported by twenty years' actual occupancy, or a substantial inclosure of the premises by the deft., or by him or those through whom he derives title: 2. A cultivation of part of the premises with a claim of title to the whole for that time, will not constitute a defence, beyond the portion actually improved: 3. Even where such possession is under a deed, a paper title for a large tract, as 783 acres, and only two acres improved, with a claim of title to the whole, the *adverse* possession is confined to the actual improvement, the two acres: 4. The doctrine of the constructive possession of lands, by the cultivation of a part, claiming the whole under a deed, does not apply to large tracts of land not purchased for actual cultivation: 5. It is applicable, in general, to a single farm or lot of land only, purchased for actual cultivation: 6. A *constructive adverse* possession, must be founded on a deed, or paper title, though such title need not be a rightful one. This case differs from some in Maine, as may be seen in different parts of this work. Ch. 178, a. 23, s. 21; ch. 178, a. 14, generally; ch. 104, a. 4.

Jackson v. Woodruff & Doty, 1 Cowen, 276—290.

9 John. R. 174; 18 do. 40—355.

§ 26. Ejectment for certain lots in Rochester. Decided, 1, An objection cannot be made at the bar, that the plt. failed at the trial to make out a title, unless it was previously made at the trial: 2. A claiming under a judgment debtor's deed, has not such *adverse* possession as will avoid a conveyance executed by a purchaser under an execution on the judgment: 3. If the levy be made before the sheriff goes out of office, his deputy may complete it afterwards, by sale and conveyance: 4. A deputy sheriff who is plt. in, or assignee of, a judgment, may purchase under an execution, thereon directed to his principal. This case is not within the statute, 1 R. L. 506, forbidding officers who sell to be purchasers.

Jackson v. Collins, 3 Cowen, 89–98.

§ 14 *con.* How the fifty years are computed on 32 H. 8,

Vol. VI. Ch. 138. Art. 15. Con.

ch. 2, s. 2. In this writ of intrusion by a remainderman, or reversioner, after a life estate, the demandant must allege and count on an *actual seisin*, had by the person creating the life estate, and his taking *esples*, and the fifty years allowed by said statute for bringing the action, is reckoned from his seisin, not from the death of the tenant for life, or from the commencement of the *adverse* seisin. The length of *adverse* possession had debarred the plt. in ejectment and obliged him to resort to one of the ancient remedies of the common law. The second tenant for life had been dead but forty years before the bill was filed in 1814. The first tenant for life, Benjamin Widdowson, died in 1752; who was seised in fee April 21, 1751, and settled the estate on himself for life; (his heir the plt.) then on Elizabeth Robinson for life, &c.; she entered in 1752, and took possession. She surrendered, &c., 1759, and died in November 1774; but she suffered a recovery, and then by will disposed of the estate to the person under whom the defts. claimed. The plt. is the remainderman in fee, under the settlement of 1751. The word *predecessor* in the act, applies only to a *corporation*, so not to E. Robinson; then the seisin meant, is that of the *ancestor* who died above fifty years before the *remainderman* sued. Observed he did not claim as *heir*, hence not in relation to an *ancestor*, and the plt. added the time began to run from the death of E. Robinson, when the adverse possession commenced; but the master of the Rolls decided as above.

1 Jacob & W. 532—550, Widdowson v. Harrington.

§ 18. 1. Entry in *the quibus* on the plts. on seisin for life. Summon D to answer to P, in a plea of land, wherein he demands against the said D, forty acres of land in ——, bounded ——, with the appurtenances, whereof the said D, unjustly, and without judgment, *disseised* him the said P, within thirty years now last past; whereupon the said P, says that he was seised of the demanded premises, with the appurtenances in his demesne, as of *freehold* within thirty years now last past, by taking the profits thereof to the value $20 by the year, and the said D disseised him thereof, and still unjustly withholds the same.

§ 19. 2. Entry in *the quibus* by the heir on his father's seisin. As above to *appurtenances* which the said P, claims to be his right and inheritance, and whereof the said D, unjustly and without judgment disseised A B, father of the said P, whose heir he is, within thirty years now last past, whereupon he says the said A B, father of the said P, whose heir he is, was seised of the said ——, with the appurtenances in his demesne, as of *fee and right*, within thirty years now last past, by taking, &c., as above, and the said D thereof,

disseised him, and from the said A B, the right descended to the said P, who now demands the same as son and heir of the said A B, and the said D unjustly withholds the same. Vol. VI. Ch. 178. *Art.* 15. *Con.*

3. Entry in the *quibus* by a minister on his predecessors' seisin.

§ 20. Summon D, to answer to P, minister of the parish of ———, in a plea, as above, to appurtenances which he claims to be the right of the said parish of ———; whereof, the said D, unjustly, and without judgment, disseised one A B, late minister of the said parish, whose successor the said P is, within thirty years now last past. Whereupon the said P says that the said A B, late minister of the said parish of ———, whose successor he is, was seised of the said —— in his demesne, as of fee in right of the said parish, within thirty years, &c.; taking, &c., and thereof the said D disseised him; and from the said A B, the right came to the said P, who demanded the same as his successor, in right of said parish. But the said D, still unjustly withholds the same. These writs of entry are but little used except in Massachusetts and Maine. Not in England till near a century after the conquest, and have long been there disused, except in a very few cases. Numerous are the forms of these writs in the register and old books. Generally short and technical, suited to almost every case of freehold and fee simple, and excluding the absurd trial by battle.

§ 21. A writ of entry lies to recover possession of a store, though standing on the land of a third person: 2. If the tenant plead the general issue to this writ, he thereby admits his possession of the demanded premises under claim of title. If two plts. jointly sue this writ, and one only proves a title, the tenant must have judgment; and to disprove the demandant's seisin, the tenant, in this action, may give evidence of a title in a third person. The demandant, Bailey, claimed under the deed of Giles Richards, of 1803. The tenant, March, proved Richards sold all his interest in 1797, to one under whom the tenant claimed; but he acquired his title after the action was commenced, to which there was some objection. 2 N. H. Rep. 9. p. 167. p. 522. Bailey v. March.

§ 9 *con.* This was a writ of entry on the seisin of the plt's. intestate as in fee and in mortgage, by means of a deed from the tenant, dated June 1, 1804, and a defeasance from the intestate, of the same date, with a condition the deed should be void on payment of $1083 in three years. The tenant pleaded the general issue; also specially that the defeasance was never executed by the intestate. At the trial, February term, 1819, the deed and signature of the defeasance were duly proved; but the subscribing witness to the defeasance Art. 17. *Con.* Bickford v. Daniels.

Vol. VI. Ch. 178. Art. 17. Con.

farther testified that the defeasance had never been in the tenant's possession, and by express agreement of the parties never was to be delivered to the tenant, unless he performed the condition. Both parties wished that if the money was not paid at the time stipulated the deed should not become a mortgage; hence the intestate deposited the defeasance with the witness, till the expiration of the three years, when the money, not having been paid, the defeasance was returned to the plt. Judgment for the tenant. Held, 1, an adm'x. may sustain a writ of entry to foreclose a mortgage to her intestate. 2. If the writings were a mortgage or not, was properly settled on common law principles. 3. The said defeasance did not render the deed a mortgage, as the defeasance did not take effect. 4. A special *non est factum* is an unnecessary plea, and when the plt. does not count on a mortgage, the question if his title is or is not by a mortgage, can always be raised by a plea or a suggestion, alleging his title is only by mortgage, and to this the plt. will demur or take issue.

Art. 19. Con. 17 Mass. R. 356, 359.

§ 4 *con.* No interest is chargeable on monies advanced to a child by his parent; for the true notion of an advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement. It cannot be viewed as a debt on interest.

Art. 22. Con. 3 Pick. 429—434, Parker adm'r. v. Thompson.

§ 3 *con. Former judgment how proved.* When the judgment in one action is to be the ground of another, the identity of the cause of action may be averred and proved by other than record evidence, or by parol. A gives B a covenant to pay the amount of a judgment that may be recovered against him in a certain case, not exceeding $1500. A judgment is recovered against B for $2000 and more. A is held to pay B only the $1500, and interest from the time. This sum is demanded of him or from the service of B's writ on him.

Art. 23. Con. 1 Rand. 58—65. 2 Rand. 5—20, Morris & al. v. Tirrell.

§ 15 *con.* If land be recovered in ejectment, and the deft. goes into chancery to obtain compensation for improvements, he will not succeed if he had notice of the plt's. title when he made the improvements. In the ejectment the plts. recovered on an adverse possession of twenty years and more.

A purchaser who is evicted, is not entitled to compensation for improvements, unless the owner has been guilty of fraud, by permitting such improvements without giving notice to the possessor, or of gross laches in asserting his claim after he is apprised of it.

Art. 24. Con.

§ 2 *con.* If the heir of the disseisee bring his writ of entry against the desseisor, this is a writ of entry in the *quibus*, and was given by stat. West. 1, c. 47, Reg. s. 229; 3 Reeves' Hist. 33. Some extend it no further.

§ 6 *con.* This act was extended to A, holding lands under a title he conceived to be good, though bad in fact; and being evicted, he was allowed the benefit of the betterment act, he being in fact entered without title, and held by possession and improvement. Deft. in pleading, adds, he and those under whom he claims, have been in actual possession of —— for six years and more before suing out the plt's. writ, and have greatly increased the value thereof, by virtue of the buildings and improvements made by them, &c.; prays the jury, if they find for the plt., may inquire, and by their verdict ascertain the increased value of the said tenement, by reason of the buildings and improvements made thereon by the deft. and those under whom he claims. The plt. prays, if the jury find the increased value by, &c., may also by their verdict ascertain what would have been the value thereof if no buildings or *improvements* had been made thereon by, &c. See art. 23, s. 15, *Improvements*. Act applies to tenants in common.

17 Mass. R. 350.

1 Greenl. 88—92, Bracket v. Norcross—1 Greenl. 309—316; 1 Greenl. 348—351; 2 Greenl. 352-357.

§ 10 *con.* South Carolina. An *uninterrupted* possession and occupation of land for five years after the right accrues, will give a good title to it against a grant. All persons claiming after that time will be barred, except infants feme coverts; these are allowed five years after of age, &c.; and no claim to land is good but by a suit at law. Act February, 1788, 1 Bay, 375; 2 do. 399, 429, 487. The maxim *nullum tempus* applies to the State. Const. R. Tread. Ed. 135; 1 McCord, 139, 279, 555. Act applies to a judgment creditor in regard to a *bona fide* purchaser, 2 Bay, 339. The five years' possession must be actual, constant, adverse, and notorious, to give title. 1 Nott & McCord, 408; 2 Nott & McCord, 417, 578; 1 McCord, 279; Const. Rep. Tread. Ed. 329. See ch. 179, a. 19, s. 27.

§ 24. *Estates in tail limited, &c.* Held, an *adverse* possession of twenty years against the tenant in tail bars the entry of the issue under the 21 Jam. 1, c. 16. The general court held not barred. Its judgment reversed in the court of appeals, June T. 1796. By devise in 1677, Richard Webb and John Webb became seised in tail of a tract of land called Bedford. By deed of partition, July 25, 1710, R. Webb became seised of the west moiety. The same day, by deed of bargain and sale, sold his said moiety to John Wilson, and died May 10, 1719, without issue of his body, leaving John Webb 2d., his nephew and heir, 14 years old. Wilson bargained and sold to John Knowles; his child and sole heiress was Mary Knowles. She devised to her daughters Sarah, Elizabeth, and Margaret, the defts. They, and those under whom they claim, held the sole, exclusive, and adverse seisin of said west moiety from July 25, 1710, until the entry of the lessors of the plt., July 1,

3 Har. & Mc H. 244 to 317, Martindale v. Troup and wife.

VOL. VI. CH. 178. *Art.* 25. *Con.*

1782, without any claim or interruption by said lessors, or those under whom they claimed. There was a special verdict in ejectment. The question made was, 'whether every issue in tail, having a new title, is allowed 20 years to bring an ejectment;' and if the ancestor, by his laches, suffer himself to be barred, will that affect the issue in tail?' Plt. cited 32 H. 8, c. 2, as to formedon, and 21 Jam. 1, c. 16, including the formedon in descender. In arguing for the defts., great stress was laid on the lessors of the plt. having lost their right of *entry in ejectment*, and their *right of possession*. Agreed the first tenant in tail was barred, as he did not enter in twenty years after his right to enter accrued; hence argued all his issue was barred, and that if each had a right of entry, as on a new title in him, it might be *ad infinitum*. But did not the makers of the statute *de donis*, mean this *ad infinitum* if the issue so continued? Yet the 21 Jam. 1, might defeat this meaning; and the question was, did it? Pinckney, counsel for the deft., in the court of appeals, admitted, and truly, that the statute *de donis* perpetuated the estate by descent, in the issue *per formam doni*, as long as it should continue. Of course he admitted it so continued, until defeated by later statutes or inventions to dock the entail. He also admitted the issue may recover in *formedon* when it cannot in *ejectment*. His point here was the issue in tail, has the estate solely, by *heirship*, and when 21 Jam. 1, was enacted, his ancestor could by fine recover and bar his issue. Hence it ceased to be secured by the statute *de donis*; this was true, 21 Jam. 1; so said P., the issue in tail, is within the words, 'and their heirs' in 21 Jam. 1; and the *formedon in descender* is his highest action; his writ of right barred after twenty years.

It may be observed, that neither court gave any reasons; nor in the report does any counsel appear for the plt. in the court of appeals. Mr Pinckney, in 47 pages, found some decisions on old statutes, as 18 E. 1, c. 4; 27 E. 1, c. 11; 1 R. 3, c. 7; 4 H. 7, c. 24; 26 H. 8; 32 H. 8, c. 2; 10 and 11 W. 3, c. 14, &c., that seemed to include *heirs in tail*, but none on 21 Jam. 1, c. 16, that had any bearing on the point first above stated.

ART. 33. *Con.*

§ 11 *con.* *Assumpsit* for use and occupation of a house and lot in Troy. The deft's. wife entered Sept. 1819, with the plt's. consent to hold it free of rent, without limitation of time, she engaging to pay the ground rent, $6 25, due to Vanderheyden. To this the deft. assented, and paid it up to May 1, 1822. Oct. 26, 1820, the plt. gave notice to the deft. and his wife to quit within three months from that time; proof the pre-

Bradley v. Covel, 4 Cowen, 349—351.

mises were worth, in fact, from $100 to $140 a year. Plt. claimed rent accordingly for the time after the notice expired. So the judge charged the jury, holding the notice to quit sufficient. Verdict for $137. Deft. excepted to the judge's decision. New trial granted, and held, 1. A tenancy *at will* is held to be a tenancy from year to year merely for the purpose of notice to quit: 2. Three months' notice terminates this tenancy; and it seems after this, the lessor may have trespass: but, 3. In such case, where the holding is at a stated rent, as here, $6 25. The notice turns the tenancy *at will* into a tenancy *from year to year*, running from the expiration of the three months' notice: 4. This imposes the necessity of six months' notice to quit ending on a day in the year agreeing with the end of the three months' notice in order to warrant an ejectment: and 5. The holding over from year to year is at the *former* rent; here I think was the error above: 6. Where the tenants hold over after such notice without any new stipulation, the law implies an agreement that it be at the former rent: admitted where the holding over is of the *same former* tenancy, because *its terms* pass over with it as if A be my tenant for a year, and he holds over, the tenancy and the terms of it pass together, *the terms as annexed to the tenancy*. But the case is very *different* when the first term agreed is one thing as a tenancy at *will*, to which here the ground rent, $6 25, was annexed; and the second term is a *different* thing, as a term *from year to year*, on what principle do the terms of the first tenancy become annexed to the second tenancy, so different, resulting from a new and different agreement expressed or implied of the parties. It seems obvious when the first tenancy at will ceased to exist, *the terms of it* ceased to exist also; and when a second and new tenancy, as from year to year, was so agreed, the understanding of the parties, and so the law annexed new and reasonable terms to this new tenancy, that is a reasonable rent; so the judge below was right; the authorities for the new trial cited by the court, did not apply to this peculiar case. 1 D. & E. 159–163. The first tenancy *itself* was continued over. 7 Johns. R. 4—5, was a case of waste and trespass therefor, on the ground the tenant *at will*, by his waste, had terminated his estate. 5 D. & E. 477, Doe *v.* Bell, is the same as 1 D. & E. 159, &c. As to 15 Johns. R. 505, it was not decided as applying.

§ 13 *con.* A tenant holding under a *parol* lease is tenant *at will* on Mass. Act, 1783, ch. 37. *Quære* if he be entitled to notice to quit; if he is, notice must be regulated by the terms of the contract, as where the letting is by the month, a month's notice is sufficient. This was a writ of entry *sur disseisin*. Plea *nul disseisin*. The plt. had sued for rent at $7 a month and recov-

2 Pick. R. 70–79; Collins v. Lunt.

ered ; the court thought this was sufficient evidence the tenant held from month to month ; hence a month's notice was sufficient, and as he acknowledged, he was requested two months before sued, to remove, he had sufficient judgment against him. It does not seem yet to be settled in Massachusetts whether a tenant at will is entitled to notice to quit or not ; if any notice, it must be *reasonable* notice only ; for if for any *certain time*, as six months, three months, or one month, &c. it is obvious he would not be tenant *at will*, for if three months' notice, for instance, and notice to quit be given in him in one hour after, he would, of course, be tenant *for three months* from the time of the notice given ; as till the expiration of the three months, he would be immoveable in any manner ; and it is obvious that the *reasonable* notice if necessary at all, must be according to circumstances. A tenant at will of a wharf, for instance, when he is not using it, may conveniently quit on a few minutes notice. Not so a tenant at will on a large farm in the season of raising his crops, &c. It is thought by some to be a hard case that a tenant at will must quit without *previous* notice. It may be observed it is his own choice to be a tenant at will. He cannot be turned out by force, and if, when ordered out, he does not move, he is only subject to an action and costs, or to be moved without violence. A man who gives his note to pay *on demand*, is immediately liable to an action and costs, even without any notice or demand. However unprepared to pay he may be, yet such notes are daily given. This only is proved, men must be careful in making their contracts ; though I think *reasonable* notice is best, I see, if not required, no greater hardship in this than in scores of other cases in which men, by their own negligence in making their contracts, or in their neglect to make them, or careless conduct, subject themselves to inconveniences.

§ 14. *Pennsylvania. Notice to quit must be given.* 1. In case of a lease for a year, and from year to year, as long as both parties please ; so if the lease be to one to hold during the lessor's pleasure ; but where it is to expire at a day certain, notice to quit is not necessary, and without it the lessor may maintain ejectment. But if the lessor permit the lessee to hold over a number of years after the lease is expired, he must give notice to quit. Where there is a lease from year to year, notice to quit must be given *three months before the expiration of the year*, and if not given the moment another year begins, the lessee holds to the end of it.

Bedford v. Mc Elkerren, 2 Serg. & R. 49–50.

1 Binn. 334.

If the lease be for a year, and the lessee is allowed to hold over, from year to year, notice to quit, given the first month of a new year is illegal, lessee holds for that year.

5 Serg. & R. 174.

CHAPTER CLXXIX.

GENERAL PLEAS IN BAR.

§ 3. Where the condition of a bond contains several particular matters, the obligor cannot plead performance generally, but must shew how he has performed each part. Reynolds *v.* Terrance, 1 Const. Rep. 125.

§ 14. *Indebitatus assumpsit* for work, and *a quantum meruit.* Plea that there was a special agreement, and that the plt. had violated it, concluded to the country, and the plt. joined issue. Held, the plea and issue precluded the deft. from excepting to the declaration. Stoll *v.* Regan, 1 Const. Rep. 96.

§ 9. If a minor and a person of age give a note, both must be sued, as the minor's note is only *voidable* and not *void.* The plt. stated was a *minor*, and so he sued the other alone. Cited Gouch *v.* Parsons, and many cases. ART. 8. *Con.* 2 Rand, 478–482.

1 Pick. R. 500–502, Woodward *v.* A. W. & H. Newhall. Action on a joint contract. One deft. pleaded infancy. Held, the plt. might enter a *nolle prosequi* against him, and proceed against the other deft.

§ 15. For the purpose of pleading *infancy*, a plea of payment may be withdrawn at the trial. 1 Har. & J. 206.

§ 24. Evans *v.* Norris, 1 Hayw. 411, an account against the plt. is not admissible in evidence under the plea of *payment.* ART. 14. *Con.*

§ 2. 8 Wheat. 675–681, Siglar, &c. administrators, plts. in error *v.* Haywood, State treasurer of North Carolina. Held, an executor or administrator is not liable to a judgment beyond the assets to be administered, unless he pleads a false plea: 2. If he fail to support his plea of *plene administravit*, it is not necessarily a false plea within his own knowledge; and if it be found against him, the verdict ought to find the amount of assets unadministered, and the deft. is liable for that sum only: 3. Then the judgment is *de bonis testatoris.* Ch. 29, a. 4, s. 17; a. 16, s. 31. ART. 15. *Con.*

§ 19 *con.* Such act in another State in which the contract was made, and all parties were resident and citizens, is no bar to an action in this State on a promissory note there made. p. 180. The act runs not against a foreign creditor who has an agent here. ART. 19. *Con.* 17 Mass. R. 55–56.

§ 21 *con.* By the act of limitations of *Tennessee*, of 1797, a possession of seven years protects only when held under a *grant* or under mesne conveyances which connect it with a grant. A void deed is not such a grant; and 1 Wheat. 476. Same principle, 11 Wheat. 325–332. 9 Wheat. 541–558, Denn, or Walker, *v.* Turner.

§ 33 *con.* Guy brought *detinue* to recover sundry slaves. Pleas, *non detinet* and the Tennessee act of limitations of

Vol. VI. Ch. 179. Art. 19. Con.

three years, &c. Issue on the *non detinet*. On the other plea a replication on the saving clause. Held, the terms 'beyond seas,' in the saving clauses of a statute of limitations, are to be construed as equivalent to *without the limits of the State*, where the statute is enacted. Limitations as to slaves in Virginia and Tennessee—plt. of Virginia, deft. of Tennessee—*quære*. 11 Wheat. 361–374, Shelby and others, executors of Shelby, plts. in error, *v.* Guy. 7 Wheat. 248.

6 Wheat. 504.

§ 36 *con*. Story, J., in giving the opinion of the court, said, 'We think, therefore, that the true and safe course is to abide by the rule of law, which, after a lapse of time, will *presume* payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. The doctrine in Hillary *v.* Waller, 12 Ves. 261–266, meets our entire approbation.' The ground here is *presumption*.

2 Serg. & R. 521.

Though trusts are not strictly within the statute of limitations, yet equity adopts the principles of the statute.

By twentyone years' possession of land a *right of possession* is acquired. Sufficient for *defence* also whereon to *recover in ejectment*. 5 Serg. & R. 240. Circumstances may prove, in law or equity, the deft's. possession has not been *adverse*. 2 Serg. & R. 527. And if he hold under A he may prove A's possession *adverse*, to make out twentyone years. 5 Serg. & R. 254.

Residence is not necessary to constitute *adverse* possession. May be by inclosing and cultivating. 3 Serg. & R. 291, Johnson *v.* Irvin; 1 Serg. & R. 111; 4 do. 315–346. A citizen of South Carolina is not a person *beyond sea*, &c. Ward *v.* Hallam, s. 33.

12 Wheat. 565–567.

§ 37. An acknowledgment of the debt by the personal representative of the original debtor, deceased, will not take the case out of the statute of limitations.

CHAPTER CLXXX.

REPLICATION.

Art. 1. Con.

§ 6 *con*. Defects in a replication ought to be specially demurred to. 1 Mc Cord, 568. Must answer the whole plea; therefore, when, in an injunction bond, the condition was, the deft. 'prosecute his suit, or abide the decree of the court,' and he pleaded performance of the condition, and the plt. assigned one breach, to wit, that the deft. did not prosecute his suit to effect, the replication was held bad on demurrer.

Const. Rep. Tread. Ed. 125, Reynolds *v.* Torrence. In this case, too, the plea was bad, for when the condition of a bond consists of several parts, the obligor must show how he has performed each particular part. Id. VOL. VI. CH. 180. *Art.* 1. *Con.*

§ 25. To an action on an injunction bond conditioned to prosecute the bill to effect, *or* abide by the decree of the court, the deft. pleaded performance, and the plt., in his replication, assigned only one breach, namely, that the deft. did not prosecute his suit to effect. Demurrer to the replication, and adjudged bad. The condition was in the alternative to perform, *or* to abide, &c. The condition was performed by the deft. if he did either, and the bond not forfeited. As the plt. only negatived the performance, he left an implication the deft. fulfilled the other part, so no forfeiture at all. 1 Const. Rep. 125.

§ 1 *con.* 3 Pick. 388, 389, Merry *v.* Gay. In an action of covenant, a plea of *non est factum* may be joined with a plea of payment. ART. 3. *Con.*

§ 5. All motions for leave to plead double must be made, in the circuit court, *sedente curia*, and not before a judge, at his chambers, nor in the court of appeals. A motion to plead double, as *non demisit*, and 'no rent in arrear,' may be granted at any time in the discretion of the court, so as not to surprise the plt. 2 Bay. 407. 1 Mc Cord, 12.

§ 6. The filing of consistent double pleas, so far as their merits are concerned, is a mere motion of course, requiring only counsel's signing. 2 Mc Cord, 148.

§ 9 *con.* 4 Pick. 137, 138. To declare on a *lease* and reply a *parol* agreement is a departure. ART. 4. *Con.*

§ 4 *con.* A *frivolous* demurrer is in fraud of the ninth rule of April term, 1796, declaring a cause at issue, after twenty days, and though served within the time, will not be cause for setting aside an inquest: 2. If it be plain, from the nature of the pleadings, which plea the replication is intended to answer, this is certain enough, without expressly pointing out the plea intended by the numerical order, or any other way. As there was an affidavit of merits, the motion to set aside the inquest was granted on the usual terms. See ch. 163, s. 23, connected with that. ART. 6. *Con.* Carey *v.* Hanchett, 1 Cowen, 154–155.

A plea is not set aside merely because *frivolous*. Nor can the plt. treat it as a nullity, and enter a rule of course for judgment, as by default, or confession by *nil dicit*. The deft. has a right to retain it on the record, and have it passed upon, with a view to bring a writ of error. Davis *v.* Adams, 4 Cowen, 142.

§ 2 *con.* An action brought in the name of A. B., cashier of a certain bank, is an action by A. B., *individually*, and the ART. 8. *Con.*

 4 Rand. 359.

Vol. IV. Ch. 180. Art. 11. Con.

words *cashier*, &c. are surplusage; and a corporation can only sue by the name and style given it by law.

§ 22. Of a specialty; it need not be made where it has been pleaded, and remains in another court, or in the same court in another action, such former *profert* being averred. 2 Bibb, 330. Nor where it is in the possession of the adverse party. 3 Bibb, 8. To an action on a covenant for the conveyance of land, the deft. pleads a tender of a deed, according to the true intent and meaning of the covenant. He must make a *profert* of the deed. 1 Bibb, 283.

Art. 12. Con.

Assumpsit for use and occupation. Plea, that after the cause of action accrued and before the suit, the deft. delivered to the plt. certain goods in satisfaction of the promises in the declaration, and the plt. accepted them in satisfaction. This plea being in every respect false, the court allowed the plt. to sign judgment for want of a plea. 1 Barn. & Cres. 286. See Practice, ch. 194, a. 1, s. 19. False plea not set aside, unless intended artfully to draw the plt. into special pleadings to his disadvantage, &c. 4 Cowen, 47, 48; 2 B. & A. 197, 777.

CHAPTER CLXXXI.

DEMURRERS.

Art. 1. Con.

§ 2 *con.* 1. On demurrer the party who commits the first substantial fault in pleading shall have judgment against him: 2. This was an action of *assumpsit* on a policy of insurance, founded mainly on the clause that respected the ship's being *rotten*. In this clause it is provided, 'that if the vessel, upon a regular survey, shall be thereby declared *unseaworthy by reason of her being unsound or rotten*, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be bound to pay their subscriptions on the policy:' 3. A plea bad in substance is not aided by the replication: 4. In declaring on a contract well stated in the first count, it need not be repeated in the after counts in the same declaration, but it is enough to declare that it is the same as is stated in first count: 5. A survey on a vessel according to said rotten clause is properly made within a reasonable time after the vessel arrives at her port of destination: it need not be made before: 6. In pleading such a survey, it is enough to state it was regular. If the assured has a right to object to circumstances of impeachment, it belongs to him to state them: 7. An averment, the ship was, by

Com. Dig. Pleader, E. 37. M. 1. 2.—8 Coke, 120.—2 Salk. 519.—15 Johns. 191.

such survey, declared unseaworthy, by reason of being rotten, is sufficient within the rotten clause; so far the plea specially pleading the ship was rotten was good: but 8. An averment, the ship was found by the survey to be *in a very bad and rotten condition* is not good. It implies a mixed cause of unseaworthiness, whereas the plea ought to show clearly that the unseaworthiness arose from the *rottenness only*, to make a bar flat and complete, within the said rotten clause, so this plea was bad in substance, and not aided by the plt's. replication: 9. The defs. need not state in his plea matter that properly comes from the plt. The survey is the act of the *assured*: the *assurers* are not parties to it, so not answerable for any defects there may be in it: 10. The plea stated a survey made at Cadiz, and the replication traversed that the survey was made at Cadiz, or *elsewhere*, so this replication was bad on special demurrer: 11. The issue must be as broad as the traverse; a rejoinder as broad as such replication would be a departure from the plea. Griswold & al. *v.* National Ins. Co. of the city of New York, 3 Cowen, 96–120. In this case there were three special counts on the policy, on the principle above. The fourth, the usual money counts consolidated into one. The policy stated in each count contained said rotten clause. The policy in the second and third counts was stated thus, 'for the same voyage, and upon the same subject matter of insurance, and upon the same terms and stipulations, and containing therein, to the same effect, as in the said policy of insurance in the said first count of this declaration, as above mentioned,' &c.

20 Johns. 823. 4 Johns. R. 135.

It is to be inferred from all the pleadings and decisions in this cause, that these said counts were considered as good. *Pleas* to the first, second, and fourth counts, the general issue. To the first and second counts, a regular survey on the vessel, stating when and where, &c. on which survey she was declared unseaworthy by reason of her being *rotten*. To the first count alone, a regular survey on the vessel, upon and immediately after her arrival at Cadiz, to wit, on the 15th October, 1819, by which she was found to be in *a very bad and rotten condition*, and that to make her seaworthy would amount to $5000, or upwards, according to the report of Thomas Hill, one of the surveyors, a ship carpenter, and that it was the firm opinion of the surveyors it would be best for all parties concerned in the ship, that she should be condemned. To the second count alone, the same, omitting the report of the ship carpenter. To the third count, a *non assumpsit*, as to the general average, and as to the residue a survey in the same form as the last mentioned plea to the second count.

Replication—to the second plea, which covered the first and second counts, that the ship arrived at Cadiz September 15, 1819, and after the expiration of at least fifteen days, to wit, on the 11th of October, 1819, a survey on the vessel, by which it was found that the stern frame had apparently worked the wooding ends under the counter, open, and the ship making a great deal of water; that after the expiration of at least nineteen days, and not sooner, to wit, on the 15th of October, 1819, a second survey, *supplemental* to the first to ascertain the expense of the repairs reported by the first survey, by which survey it was found, as stated in the third plea, with an averment, that the second survey is the same as the one mentioned in the second plea; that the survey was not ordered by a court of admiralty or other competent jurisdiction, that the surveyors were not sworn according to maritime law and usage; that it was not a regular survey within the policy; and concluded with a formal traverse, that this survey, or any other, had upon the ship at Cadiz, or *elsewhere*, found the vessel unseaworthy by reason of her being rotten, in manner and form, &c. To the third plea the same, omitting the traverse. To the fourth plea the same, except concluding with a traverse, that the survey, mentioned in the fourth plea, was of any other tenor and effect than in the replication set out; as to the residue of the fifth plea, the same as in the fourth. Special demurrer to each of the replications, assigning the following causes to the replication to the second plea: 1. The traverse seeks to put in issue matters not in the plea: 2. It is double and multifarious: 3. No apt and proper issue can be taken upon the traverse: 4. The traverse tenders an issue on matters contained in the inducement: 5. In other respects double, uncertain, &c.

II. To the replication to the third plea, 1. It does not traverse or avoid the matters contained in the plea, except by inference and legal construction: 2. It is evasive, uncertain, not issuable, and argumentative, in alleging that the surveys were made, one at least fifteen and the other at least nineteen days after the arrival of the ship: 3. It is double and multifarious, seeking to put in issue distinct and independent facts thus: 1. That the second survey was not had by the order of the court of admiralty, or other competent authority: 2. Surveyors not sworn: 3. Not a regular survey within the meaning of the policy: 4. That there was another survey of October 11th: 5. That the one of the 15th was supplemental to the other: 6. In other respects double, uncertain, &c.

III. To the replication to the fourth plea: 1. The traverse seeks to put in issue the matters contained in the inducement:

2. It contains only matter of legal inference and construction, arising out of the *inducement:* 3. No apt or proper issue can be taken on it: 4. It is in other respects uncertain, &c.

IV. To the replication to the residue of the fifth plea, the same causes as to the residue of the fourth plea. Joinder in demurrer to each separately. May term, 1823, J. Wells for defts., argued in support of the demurrers, and G. Griffith and T. A. Emmett, for the plts., at great length, and cited numerous authorities. The decision as above. I have thus noticed this cause some what at large, not only on account of the matter in it, but also for the novelty of the pleadings in an American insurance cause. Judgment for the defts. on their demurrer to the replication to the second plea, (Cadiz and *elsewhere*) with leave to the plts. to amend, paying costs, and judgment for the plts. on the replications to the other pleas. This case is a very useful one, so far as many authorities are aptly applied to a number of points in special pleadings, and especially in regard to special demurrers.

§ 14. *In Kentucky* the practice is, if the deft. demur to the declaration, and at the same time files pleas in bar, for the court first to dispose of the demurrer, before touching the pleas. So, 3 Bibb, 497, the practice is, where a party has demurred to the pleadings, and the demurrer is overruled, to permit the demurrer to be withdrawn, and issue to be taken on the fact; and, 4 Bibb, 27, a demurrer brings the whole pleadings before the court, and judgment must be given against him who committed the first fault: Hard. 508: if a partnership sue, and omit to name all the partners, this is only cause of special demurrer or plea in abatement, and cannot be taken advantage of in arrest of judgment: 3 Marsh. 492; where, in a note, the deft's name is spelt as it is vulgarly pronounced, and in the petition it is properly spelt, this is no cause of demurrer; 3 Marsh. 557, Gray *v.* Coren; a deft. pleads two pleas, one traversing the plt's. action *in toto*, the other in part only. On overruling a demurrer to the declaration, it is irregular to give judgment against the deft., for that part of the demand not answered, till the issue is tried on the other plea, and then only one judgment is to be entered: 3 Marsh. 612: on overruling the plt's. demurrer, judgment is to be entered for the deft., unless the plt. withdraw his demurrer, and files a valid replication. Demurrers to evidence see 3 Marsh. 277–337; 1 Litt. 349: 3 Marsh. 158: on sustaining a demurrer to a plea in bar, a *respondeas ouster* is not necessary: these pleas appear, as do the pleadings in Kentucky, generally, to be the work of good pleaders.

1 Litt. 4.

§ 15. If there be a demurrer to one plea, and issue on another, the parties must be prepared to try the issue, though

Cunnison *v.* Hunter, 2 Hayw. 326.

Vol. VI. Ch. 181. Art. 4. *Con.*

the demurrer be under the consideration of the court, on a former argument: a material fact was omitted in the pleadings; the court allowed a demurrer to the plea to be withdrawn, and a replication to be filed; id. 138: A general demurrer admits the fact, a special demurrer does not: 1 Hayw. 364, Davison *v.* Mull: After a demurrer to a declaration is argued, it may be amended on payment of costs. 1 Carolina Law Rep. 472.

1 Mc Cord, 211. id. 207.

§ 16. A variance between the writ and declaration may be taken advantage of by special demurrer, and need not be pleaded in abatement: is not in arrest of judgment.

2 Cowen, 512, 513.

§ 17. In trespass against a sheriff, for an act done by him in virtue of his office, he pleaded the general isssue, and two special pleas; to which the plt. replied; and there was a demurrer to the replications, and a verdict for the sheriff on the general issue. Held, the demurrers could not afterwards be argued, and the deft. had his double costs: 2. Where there are several pleas, and some of them end in issues at law, and some to an issue in fact, the plt. may first argue the demurrer, or try the issue of facts at his election. After a verdict against the plt., his demurrer can avail him nothing, for the court must see on the whole record, judgment must be for the deft., for whom the verdict is found.

Several issues at law, joined at different times in the same cause, its order on the calendar is determined by the date of the issue.

Shook *v.* Fulton & al. ex'rs. 4 Cowen, 424, 425.

§ 18. *Judgment on the whole record.* The defts. pleaded two distinct pleas: neither, alone a defence, though both together would be. Plt. should have demurred, but did not, but replied separately, and went to trial. Pleas found for the defts. Judgment for them on the whole record, as on it, the cause was with them. No cases cited: probably none to be found on pleadings.

CHAPTER CLXXXII.

TRIALS.

Art. 3. *Con.*

§ 1 *con.* 16 Mass. R. 220. If one serve as a juror in the federal courts within three years, he is not returnable as a juror in the State courts; statute 1807, ch. 139, s. 5.

1 Pick. R. 196.

If a constable, in his return, omit to state the day he summoned the jurors, but they appear and answer, and it appears they were timely summoned, they may be sworn, and he allowed to amend his return, paying costs for bringing him in.

Art. 4. *Con.*

§ 1 *con.* But the discharge of the jury from giving a verdict in a *capital* case, without the prisoner's consent, the jury being

unable to agree, is not a bar to a subsequent trial for the same offence. 2. The court has a discretionary power of discharging the jury from giving a verdict, in cases of this nature, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated. The attorney of the United States did not agree to this discharge of the jury: it was, therefore, the mere act of the circuit court. 9 Wheat. 579–581, United States *v.* Perez.

§ 4. No religious belief or persuasion, can exempt a man from serving as a juror: 2. Nor is it any objection on an indictment for passing a counterfeit note of the bank of South Carolina, that he is a director of the bank, he owning no stock in it: 3. A juror cannot be examined on *his voir dire*, as to any opinion he may have formed or expressed in relation to the prisoner's guilt or innocence. State *v.* Wilson, 2 Mc Cord, 393. 2 Mc Cord, 12. 1 Const. Rep. 289.

§ 5. It is not necessary that an indictment should state that the jurors were 'good and lawful men of the district:' 2. And an indictment was held good, though it concluded 'against the peace and dignity of the State,' instead of 'against the peace and dignity of the same State.' State *v.* Yancey, 4 Const. Rep. 237.

§ 6. The jury rejected a bond eleven years old, as paid, and stated in court, they did so on account of certain marks on it, appearing to be the vestiges of obliterations; which marks had not been noticed by the court, or opposite party. A new trial was granted to enable the obligee to produce evidence in explanation. 2 Mc Cord, 313.

§ 7. Answers of jurors. Decided, 1. The jury when inquired of in court as to their verdict, are, by their oath, bound to make true answer. Their statement in court, that they have not read a paper, committed to them by mistake, is good evidence of the fact: 2. Then there is no cause for setting their verdict aside. 6 Pick. 296—303, Hix *v.* Drury.

§ 5. Questions jury decides: as if a marriage exist; 1 Nott & Mc Cord, 285: what is a peril of the sea; 1 Nott & Mc Cord, 170: what is ordinary care; 1 Mc Cord, 509: so what are necessaries of a ship; 1 Mc Cord, 316: so when a vessel enters a port; 1 Nott & Mc Cord, 45, Goddard *v.* Bulow & al.: so *adverse* possession: 2 N. H. Rep. 91–310. ART. 5. *Con.*

In an action of slander, the court will not grant a new trial: 1. Because one of the jurors had, as plt., a like action pending in the same court: nor, 2. because three of the jurors against their judgment, accorded with the nine, in the amount of damages: see, also, 1 D. & E. 11; 1 Hen. & M. 335. 1 Rand. 39—45.

On a motion to set aside a verdict, on the ground one of the jurors had prejudged the cause. The court examined him on oath, &c. 3 Greenl. 304.

11 Wheat. 59–78, Etting *v.* United States' Bank, held, though it is the province of the court to construe written instru-

Vol VI. Ch. 182. *Art.* 5. *Con.*

ments, yet where the effect of such instrument depends, not merely on the construction and meaning of the instrument, but on collateral facts in *pais*, and extrinsic circumstances, the inferences of fact to be drawn from them, are to be left to the jury.

12 Wheat. 180—183. When defences are to be proved by the deft., it is error in the judge to charge the jury, and state the evidence is sufficient to maintain the defence, in law, and that the jury ought to find for him. In such case, the judge assumes the province of the jury.

5 Serg. & R. 427.

Smith v. Niel, 1 Hayw. 341. Whether a conveyance is made with an intent to defraud creditors, within the 13 Eliz. is a question of fact for the jury: so, whether a deed is fraudulent or not: 1 Hawks, 320; and 1 Litt. 112: so, what is a debtor's *fraudulent* possession: 3 Marsh. 341, 342.

3 Cowen, 358. A case cannot be turned into a special verdict, unless there be a stipulation to this effect at the trial.

6 Cowen, 53, 54. The affidavit of jurors cannot be received to show a mistake in making up their verdict, unless the mistake is produced by circumstances passing at the trial, which are equivalent to the misdirection of the judge. See 5 Cowen, 106–123, case of Sargent.

§ 6. *Challenge.* If the sheriff return a talisman, in a cause in which his deputy is a party, it is good ground of challenge to the juror, but will not support a motion to set aside the verdict. The challenge should have been made when the two talismen

3 Greenl. 215, 216. were so returned. If two or more be capitally indicted, &c., together, *quere*, how to separate in their challenges and trial. See ch. 215, a. 6, s. 5, 6; 12 Wheat. 480.

2 N. H. Rep. 349. § 7. Challenge to a jury for favor, is tried here by the court, and it is a good cause, the juror, as a magistrate, has taken the principal depositions used by one party in the cause: but if the cause is known before the trial, it will not prevail unless then

p. 474. taken. Many cases of challenges; 1 Cowen, 402–442.

Pringle v. Huse, 1 Cowen, 432—442. § 8. Cause was brought on for trial in due course. The plt. challenged the first juror drawn, A, *for favor*, because, after summoned as a juror, he had expressed an opinion against the plt. Two other jurors were then drawn from the box, and not challenged, they sit as *triers* of the challenge of the first. Two witnessess were examined: A, one of them, offered by the deft., was objected to by the plt., but admitted by the court. He denied the declaration imputed to him; but the plt. proved it, and refused to go to trial. Held, 1, A was a witness: 2. That the plt. might refuse to go to trial: 3. Each party to pay his own costs.

11 Wheat. 415—417. Where, in a special verdict, the essential facts are not found by the jury, though there is sufficient evidence to establish them,

the court will remand the cause to the court below, with directions to award a *venire facias de novo*. Vol. VI. Ch. 182. *Art.* 5. *Con.*

The jury may be polled any time before the verdict is recorded at the instance of either party, whether it be a sealed or an oral verdict. 3 Cowen, 23.

§ 20. *Certiorari* to a jurtice court. The irregular conduct of a jury in his court is assignable, as an error *in fact:* 2. It is irregular for a jury, each to put down a sum, add them together, and divide by 12, and adopt the quotient as their verdict: so is art. 7. s. 6. Art. 6. *Con.* 1 Cowen, 238, Roberts & al. v. Failis.

CHAPTER CLXXXIII.

PLEADINGS.—NEW TRIALS.

§ 1. Trespass, *de bonis asportatis.* Plea, property in A *and not in the plt.*, justifies as deputy sheriff, replication *de sua injuria*, and traversing the property was in A: rejoinder, the property was in A: issue, and verdict of guilty. Held, the issue was immaterial, and repleader ordered. The fault was in the replication in not taking issue on the traverse in the plea: 2. If the court be at a loss how to give judgment, a repleader will be awarded on the motion of either party. Art. 2. *Con.* 3 Pick. R. 124 127, Gerrish v. Train. 1 Har. & Mc H. 153.

Two are sued on their bond, and it abates as to one, by his death, and the verdict only finds the survivor has not paid, and is bad, and a new trial must be granted: cause sent back, &c.; and 1 Rand. 177–281. 1 Rand. 269–271.

§ 10. Indicted for murder in the State prison and convicted; new trial moved for. Held, the supreme judicial court has power to grant a new trial, on the motion of one convicted of a capital offence, sufficient cause being shown therefor: 2. The admission of illegal testimony against the prisoner on his trial, after objection by his counsel, would be a good cause for granting a new trial: 3. Objections to the competency of a witness founded on a conviction of crime, must be made in the trial, and when a witness is offered to be sworn: 4. Must be supported by the record of the conviction and judgment: 5. The conviction of an infamous crime, in a foreign country, or in any other of the United States, does not render the object of such conviction an incompetent witness in the courts of this State. Art. 4. *Con.* 17 Mass. R. 516–552, Commonwealth v. Green.

§ 11. New trial granted because the judge, after the court was adjourned, wrote a letter to the jury, respecting the cause committed to them. The jury informed him they could not agree, his letter gave them directions, &c. 1 Pick. R. 337–342.

VOL. VI. CH. 183. *Art.* 4. *Con.*

§ 12. Where the judge admits incompetent evidence, the court will not judge how far it did or did not influence the jury, but grant a new trial. 2 McCord, 157.

§ 13. The verdict was for $5000, in an action of slander. The damages appearing to be excessive, the court granted a new trial. 2 McCord, 230; see a. 9, s. 10, and 3 Greenl. 305–316.

ART. 6. *Con.*

§ 3 *con.* Newly discovered evidence no cause of a new trial, if it might have been had by due diligence before the trial. Williams *v.* Baldwin, 18 Johns. R. 489; 9 do. 264; 15 do. 293.

§ 23 *con.* On the ground of new discovered evidence, the party must show, 1. The evidence has come to his knowledge since the trial: 2. Not for want of attention and diligence it was not sooner discovered: 3. That on a new trial it will probably produce a different verdict. 5 Serg. & R. 41, Moore *v.* Philadelphia Bank. Same principle 3 Serg. & R. 604.

2 Cowen, 479–483.

§ 41 *con.* If a judge omit to charge the jury on any particular part of the evidence, the way is to request him to notice it. If he refuse, it is not cause of a new trial, but of a bill of exception, (not a *mandamus*) to compel a new trial, though the refusal be by a judge of the common pleas, who should refuse to grant a new trial; on such bill, error lies: 2. Where words in slander must be criticised in the least degree, the jury must decide, and their decision is conclusive: 3. Slander is in the nature of a penal action, and therefore, if the jury find for the deft. against the weight of evidence, a new trial will not be granted: 4. If the verdict be so in the common pleas, and that court refuse, on motion, a new trial, if there be a counsellor at law on the bench, the supreme court will not interfere by *mandamus;* because granting a new trial rests in discretion: 5. Though this court may interfere in an extreme case of this nature, as where there is room to doubt, yet such remedy must be cautiously granted: 6. The court will in their discretion, sometimes deny a new trial, though the verdict be plainly against law, as where the nature of the controversy is trifling, &c. The action was slander, for charging the plt. with being a thief. Witnesses were sworn for the plt. but none for the deft. The words of doubtful meaning were, 'you will steal,' did they mean you have stolen, or will steal *hereafter?*

ART. 7. *Con.*

The People *v.* Goodwin, 18 Johns. R. 187. p. 212.

§ 7. In cases of *felony* as well as of *misdemeanors*, if the jury cannot agree, they may be discharged, and the prisoner be again tried by another jury. Where a prisoner is tried and found guilty, and on his motion judgment is arrested, and in his favor, a new trial may be awarded.

§ 8. Indictment for perjury, committed before L. A. Esq. Verdict, 'guilty of perjury before H. T. and L. A. Esquires, in conjunction.' A new trial was granted. State *v.* Mason, 1 Const. Rep. 200. Vol. VI. Ch. 183. *Art.* 7. *Con.*

§ 9. *Misbehaviour of the jury.* Indictment for murder. The jury was allowed to leave the court house during the trial, under the care of two sworn constables. Two of them separated and went to their lodgings, a distance of thirty rods, ate cakes and took some with them on their return, and drank spirituous liquors, though not enough to affect them in the least, and one of them conversed on the subject of the trial. They returned, heard the trial through, and joined in a verdict of guilty; a new trial granted: 2. Held, the mere separation of a jury, though impannelled to try a capital offence, and though they separate contrary to the directions of the court, will not, of itself, be a cause of setting the verdict aside: 3. But if there be the least suspicion of abuse, the verdict must be set aside, and a new trial granted. Many cases cited in different States. The People *v.* Douglass, 4 Cowen, 26–39.

§ 10 *con.* As to excessive damages in cases of tort. In cases of tort, the court will not set aside a verdict, on the ground of excessive damages, unless from the magnitude, compared with the circumstances of the case, it be manifest the jury acted intemperately, or were influenced by passion, prejudice, partiality, or corruption. Art. 9. *Con.* 3 Greenl. 305–316, Thompson *v.* Mussey.

§ 11. Though improper evidence be admitted and observed upon by the judge, the verdict stands, if no objection was made at the trial. In a civil action a fact capable of proof is not questioned at the trial, the omission to prove it, is no cause for a new trial: Otherwise if a point not raised at the trial appears on the record, and thereby it also appears, that no other evidence touching it could have been produced. 5 Pick. 217, Wait *v.* Maxwell. p. 240.

§ 12. The testimony of a witness not contradicted nor impeached, relates to declarations or conversations which happened sometime before he is called to testify, and the precise words are important, and he, though confident, is not positive, if the jury find the words are not proved, their verdict is not set aside as being against evidence. p. 244–249, Harding *v.* Brooks.

§ 13. *Assumpsit.* Endorsee against the makers of a note. Two defts. were defaulted; one pleaded never promised; such was the evidence, that a wrong inference might, and probably was made by the jury from it. It related to a fact not very material, and the rest of the evidence strongly supported the verdict. A motion for a new trial, on account of the discovery of evidence explaining such testimony, was refused. 5 Pick. 414–418, Tuttle *v.* Cooper & al.

Vol. VI. Ch. 184. Art. 1. Con.

CHAPTER CLXXXIV.

PLEADINGS—AMENDMENTS.

§ 5 11 Wheat. 280–303, Chirac & al, *v.* Rienicker. **Held**, amendments to the pleadings, are matters in the discretion of the court below; and error will not lie to the supreme court of the United States, on the allowance or refusal of such amendments.

2 Cowen, 515, 516, Sargent v. Dennison.

§ 6. By mistake the cause of action is laid after the suit is commenced: this is objected to, and point reserved: this may be amended after verdict: this was a clerical mistake of the plt's. attorney. The supreme court observed, the deft. could not be prejudiced by the amendment, and added, 'we order amendments in cases like this, in any stage of the cause.'

Wightman v. Clapp, 2 Cowen, 517. p. 521.

§ 7. It is idle, said the court, to grant an amendment, when we cannot help seeing from the whole case, that the judgment must be reversed: 2. Nor will an amendment be allowed, when it appears by affidavit, it will be incorrect in point of fact.

2 Cowen, 526.

§ 8. On *a certiorari* to a justice's court: held, the title of the cause in the court below, may be amended both in the *certiorari* and the affidavits on which grounded; amendment on payment of costs.

Rees v. Overbaugh, 4 Cowen, 124–126.

§ 9. Debt on bond: seal torn off by mistake: inadvertently declared on, profert made, and oyer given, and trial to be on *non est factum*, not noticing the seals were off. Objection for the variance. Circuit judge reserved the point. Verdict for the plt. This, and other points were made a case, with a view to move for a new trial; and, on motion, before the case was argued, the plt. was allowed to amend, by adapting his declaration to the fact, it not appearing the deft. had been misled by the form of declaring. Sargent *v.* Dennison, 3 Caines, R. 515, cited for the amendment; Paine *v.* Bustin, 1 Starkie, 74, against it; so for it 18 Johns. 510–518: old strict authorities disregarded.

5 Pick. 303, Ball v. Claflin.

§ 10. It is a general principle, that a new count filed under leave to amend, must be of the like kind of action with an original count, and such as might have been joined with it, and subject to the like plea; and the subject matter of it must be the same as that of the original count, and not an additional claim; as if the original count be *indebitatus assumpsit* for goods sold and delivered, and a bill of particulars was filed. Afterwards, two new counts were filed charging the deft. with having received merchandize, *as bailiff or factor*, and no evidence was offered, to support these two counts, of any other merchandize being received, than that contained in the bill of particulars, a verdict for the plt., on the new counts, was sustained: such an amendment

being only a variation in the *form* of declaring, will not discharge bail, nor give priority to a subsequent attaching creditor. Our statute of jeofails allows amendments *in form*.

§ 28. On motion, the court allowed the plt. to amend the writ of *scire facias*, by inserting 'register of wills,' instead of 'commissary:' the *scire facias* was on a judgment obtained by the intestate. 3 Har. & Mc H. 6, 7.

§ 29. Amendment by *restoring counts before struck out:* as where the plt. commenced his action before the statute of 1817, ch. 63, believing at the trial, he had a better remedy for the sum demanded in two of his counts, had leave to amend by striking them out; not in fact, or cancelled, though the leave was entered of record. He had judgment on his remaining counts. Afterwards, failing of the other remedy, he reviewed the action, and had leave to restore those two counts, and on them recovered judgment. 17 Mass. R. 376—379.

§ 30. If an insolvent debtor, through ignorance, mistake of his rights, or inadvertently omit to insert in his schedule, those things to which his creditors have a legal right, and which he can convey over, the court, to which he applies for his discharge may allow him to amend his schedule, and need not put the case to a jury, to try the question of fraud. Prescott v. Hubbell, 2 Mc Cord, 64.

§ 9. The clause in the Virginia act of *jeofails*, of 1819, ch. 128, which declares 'that a verdict shall cure the omission of the averment of any matter, without proving which, the jury ought not to have given such a verdict;' cannot be construed to cure the want of an averment of the *cause of action*. See act of January 29, 1805, Ed. 1808, ch. 57, s. 2, R. C. of 1819, ch. 128; 4 Munf. 72, 76, 94; this act of 1829, took effect January 1, 1820, and is repeatedly mentioned as necessary to be attended to, as its operation is to render unimportant, numerous former decisions: it contains above 100 sections. Art. 4. Con. 2 Wash. 187.

If the plt. bring *trespass on the case*, where it should be *trespass*, the error is cured by verdict, by the same statute: by it, errors cured as to one deft. are cured as to all. 2 Rand. 440. p. 446.

Is error to amend a judgment or record, after the term at which the judgment was rendered. 4 Rand, 161.

§ 2 *con.* Amendment after error brought. Error from the C. P.; the record in legal contemplation for the purpose of amendment, remains in the court below; if not, this court (S. C.) may amend it. A mistake of a date, &c., in forming a special verdict in the C. P., may be there amended, after error, joinder in error, and several notices of argument; especially where the delay is accounted for: 2. After joinder in error, the party cannot allege diminution, and have a *certiorari:* mistake was an officer's. Cited Tully v. Sparks, 2 Ld. Raym. 1570; 2 Stra. 869; 3 Johns. R. 95—444; 7 do. 468; same principle, 4 Pick. 497–501: as to the *ad damnum;* and 2 Art. 6. Con. Reed v. Barker, 2 Cowen, 408—410.

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Cowen, 410–412; amendment after error by filing papers, or if lost, supplying them, *nunc pro tunc*: 4 Pick. 499.

§ 8 *con.* Amendment in replevin after error brought. See Error, ch. 137, a. 10, s. 5; diminution alleged, like case 3 D. & E. 349–351, Cro. Jam. 444–635, ch. 185, a. 1, s. 3.

4 Har. & Mc H. 498, 499, Hutchins v. Brown.

Amendment allowed in the record, &c., of a common recovery, several years after the term at which it was suffered; the like in a sheriff's return of an attachment on judgment.

19 Johns. R. 244, Mechanics' Bank v. Winthorn.

Amendment after judgment, &c. On a promissory note, the clerk of the supreme court made a mistake in assessing damages, though not discovered until after the judgment roll was filed, and the deft. had paid the amount of the judgment to the plt's. attorney, and satisfaction thereof had been entered, and the deft. refused to correct the mistake. The court ordered the entry of satisfaction, and all the proceedings in the cause, after interlocutory judgment, to be vacated, and the clerk's assessment of damages, the record of the judgment, and the satisfaction thereof, to be taken off the files of the court, and cancelled, and the damages to be reassessed by the clerk, allowing the deft. credit for the amount paid by him, if he did not, in twenty days, pay the plt. the sum omitted by mistake.

Jackson v. Tuttle, 6 Cowen, 590.

Amendment after trial in ejectment. Declaration was amended by altering the time of demise, though the cause had been twice noticed for trial, and an objection taken on the trial that the time was laid too early, and a bill of exception signed on the point: amendment granted on payment of the costs of the motion. Cited 2 Cowen, 515; 4 id. 124–394; 5 id. 265; 6 id. 360.

Art. 9. *Con.*

§ 6. A verdict in case for a false return does not cure the want of an averment of special damage by the falsity, nor the want of any sum in damages, alleged in trover: 2. In an action between towns for relief furnished a pauper, the want of an averment that the pauper had no relations of sufficient ability, is cured by verdict, if it be alleged that the town sued was chargeable with the pauper's maintenance.

2 N. H. Rep. 315—322. p. 385.

Walpole v. Marlow.

2 Greul. 37—41.

§ 11 *con.* Defects in verdicts, in matters of *form*, not connected with the merits of the case, nor affecting the rights of the parties, the court will amend: but if the jury err in matters of *substance*, as finding for the wrong party, or a larger sum than they intended, and separate, the court will not amend. To such mistakes the affidavits of the jurors are admissible. The jury returned a verdict for the plt. then, *after* separated, made a joint affidavit, they meant their verdict for the deft. New trial granted.

Art. 12. *Con.*

§ 23. Plt. moved for leave to furnish an amended bill of *particulars* to the deft. Plt. allowed to amend it after the cause was tried: a new trial granted, and two notices of trial after

this, the cause being noticed for trial at the time of the amendment: 2. Allowed on terms of paying all costs, if the deft. changed his defence, if not, then costs of the motion. Spawn *v.* Veeder, 4 Cowen, 503, 504. Vol. VI. Ch. 184. *Art.* 12. *Con.*

§ 24. It is settled mesne process against the body (*capias ad respondendum*) returnable out of term, is void, and cannot be amended; returnable by mistake, *Sunday* being out of term: set aside on deft's. stipulating not to bring false imprisonment. Miller & al. *v.* Gregory, 4 Cowen, 504: cited 2 Johns. R. 190; 9 id. 386; 6 Mod. 251.

CHAPTER CLXXXV.

PLEADINGS—AMENDMENTS.

§ 18. 3 Greenl. 29, 30, held, if the clerk omit to affix the seal of the court to an execution, it may be amended, even after the execution has been extended on lands, and the extent recorded: so *a certiorari* may be amended, where by mistake, so dated, a term intervened: 1 Cowen, 88, Jackson *v.* Crane; *secus* in mesne process for *arrest*; so p. 41. Art. 3. *Con.*

§ 11. Amendment of a recovery by inserting a new vill. At the time of the recovery, part of the estate intended to be passed by it lay in the parish of Mersham, but this soil was not then known to the parties. On motion to amend the recovery by inserting the word Mersham, the court took time to consider, till the next day, and then gave leave to amend. So a recovery was amended by a more accurate description of the vill and county from the deed, to lead the uses. The recovery was in Michælmas Term, 28 Geo. 2; and the amendment in Easter Term, 16 Geo. 3. And the estate intended was ascertained, in part, by affidavits. Art. 5. *Con.* 2 W. B. 747 p. 1065.

CHAPTER CLXXVI.

PLEADINGS.—AUDITA QUERELA.

§ 40. Judgment against A and B. A paid the execution; execution returned not satisfied by the creditor's consent, and an alias taken out, and thereon B was committed in order compel him to pay his half of the debt. Held, *on audita querela*, the alias was improperly issued, and the imprisonment of B unlawful. In *audita querela* proceedings, there may be a jury trial and damages for the false imprisonment. And this proceeding may be had though the plt. has another remedy. Art. 1. *Con.* 17 Mass. R. 158–160, Brackett, Jr. *v.* Winslow & al.

Vol. VI. Ch. 186. *Art.* 2. *Con.*

§ 3 *con.* Petition for a *mandamus* by one claiming to be clerk of a town in the county of A to a former clerk, a rule, to shew cause why it should not issue, may be granted by the court, to be heard in any county, but must be returnable in the county of A: 2. Such rule is not a process required by the stat. 1782, ch. 9, s. 3, to have a title, and to be under the seal of the court: 3 A town-meeting held March 1, and no entry of an adjournment made, is void when held on the second; and one chosen town clerk second, cannot enter the adjournment, nor can there be admitted *parol* evidence of it.

2 Pick. R. 397–403, Taylor, petitioner, v. Henry.

§ 5 *con.* Where it lies to restore a minister to his pulpit, &c. see ch. 48, s. 44.

2 Pick. R. 414–419, Commonwealth v. the sessions.

Where a statute directs the court of sessions to do an act, as to provide a house of correction distinct from the common jail, &c. a *mandamus* lies from the supreme judicial court, to compel them to do it; was an information filed by the solicitor general on behalf of the Commonwealth; on stat. 1787, ch. 54, s. 4; stat. 1797, ch. 62; stat. 1802, ch. 22. Court cited 3 Burr. 1267; 1 W. Bl. 352; Cowp. 378, &c.

§ 25 *con.* When the supreme court will compel the judges to sign a bill of exceptions. See 9 Johns. 345; 10 id. 312; 13 id. 320: 2. When one is signed under circumstances wherein the supreme court would not compel its execution by *mandamus*, it will be set aside on motion. 3 Cowen, 32–34. *Mandamus*, to the common pleas to vacate a rule. The people, &c. *v.* the judges, &c. 4 Cowen, 402. Alternative one to such judges to shew cause, &c. id. 403.

2 N. H. Rep. 121.

§ 82 *con.* Does not lie to a court or magistrate in a case where some judgment has been already given.

Blunt v. Greenwood, 1 Cowen, 15–22.

Blunt moved for a *mandamus* to the judges of the common pleas of ——, commanding them to vacate a rule granted (Term,) that court setting aside a *fieri facias* on its judgment of (Term,) in favour of Blunt and against Greenwood. Granted and decided, this writ lies to correct an erroneous practice of said court except in mere matters of *discretion*. Held, *mandamus* lies to compel them to lay out a way, and discontinue, &c. as applied for. There had been an appeal from their decision to the common pleas. All the forms of proceeding stated minutely. See Ways, ch. 79, a. 2, s. 14 *Mandamus* to the common pleas of, &c. to enter an *exoneretur*, and to set aside proceedings against bail. Does not lie to the common pleas to vacate a rule arresting judgment. The party must apply for judgment against himself. If this be refused, then a *mandamus* issues. One to a sheriff to give a deed to a certain purchaser. Ch. 136, a. 14, s. 38. Another mandamus on the same principle. First an alternative, then a peremptory mandamus to the common pleas. See costs, ch. 195, a. 4. s. 66.

pp. 23—32, the People v. the Commissioners of Highways of the Town of Salem.

1 Cowen, 54—51.

1 Cowen, 143—144.

1 Cowen, 443, 460, 501, 513. pp. 576—579.

§ 87. The common pleas arrests a judgment for the insufficiency of the declaration. Plt. prays judgment against himself in order to bring error, the common pleas refuse such judgment, the plt. has a *mandamus*. Horne *v.* Barney, 19 Johns. R. 247. Vol. VI. Ch. 186. *Art.* 2. *Con.*

§ 88. Wherever officers have *discretionary* powers, and they exercise it, *mandamus* to them does not lie: 2. Nor if they pass on the account of a constable, for his expenses in removing paupers, allow part and disallow part: 3. If subordinate public agents refuse to act in a case for their discretion in which the law requires them to act, a *mandamus* may be issued where no other remedy exists. As if they refuse to allow a claim for services, as a county charge, the court, if it be a legal one, must instruct the supervisors in their duty by *mandamus*, and compel them to admit the charge, if they find it just. This writ, in such case, is merely to put them on the exercise of their discretion, and to act and do their duty as to the amount to be allowed. Same principle, 18 Johns. R. 242; 14 do. 325; 16 do. 61; 3 Cowen, 59. Hall *v.* Supervisors of Oneida, 19 Johns. R. 259.

§ 89. If a corporate body strike off a member without giving him any notice or opportunity to be heard in his defence, a *mandamus* lies to restore him. 1 Hawks. 274.

§ 90. The court of appeals of Kentucky has no authority to issue a writ of *mandamus*. Daniel *v.* Warren court, 1 Bibb, 496; 1 Marsh. 461.

§ 91. *Tennessee.* The court of appeals has no jurisdiction to issue a *mandamus* to a circuit court, (State,) requiring it to proceed to the trial of a cause which it had continued above thirty months. King *v.* Hampton, 3 Hayw. 59.

§ 92. A circuit court of the *United States* may issue a *mandamus* to a *State* court, which refuses to transfer a cause under the act of Congress of Sept. 24, 1789, s. 12.

§ 93. A *mandamus* does not lie to the managers of an election for a sheriff to compel them to return a certain candidate elected, for their decision is final: 2 Const. Rep. 642: Lies only where there is no proper remedy. 1 Cowen, 417–425; and see Charter, 195, a. 4, s. 64.

§ 94. The people, executors of Van Voast, *v.* Van Slyck, 4 Cowen, 297–325.

§ 95. Petition for a writ of *mandamus*. Held it lies to compel a town treasurer to issue his warrant of distress against a collector of taxes neglecting to collect and pay over the same at the time fixed in the assessor's warrant to the collector. If alternative, it is not necessary to make the collector a party, or to give him notice: 3. If on the return to the alternative *mandamus*, it appears the tax is illegal or not duly assessed, the court may omit to issue a peremptory *mandamus*. 5 Pick. 328–336, Waldron & al. *v.* Lee.

VOL. VI. CH. 186. *Art.* 4. *Con.*

§ 19 *con.* Held, replevin lies for goods taken by a warrant issued by a court martial of the United States to the marshal of the district to collect a fine imposed by the court on the plt. as a private in the militia of the State of N. York for refusing to rendevous and enter the service of the U. States in obedience to the orders of the commanding officer: 2. Courts martial are courts of special and limited jurisdiction; when the deft. justifies under its process he must affirmatively show its jurisdiction, and, 3. If it has none their proceedings are void. The marshal's avowry for so taking goods is bad; and because the court had no jurisdiction: 2. Composed of only six, instead of thirteen officers, (not showing the reason, &c.) The reference to the acts of Congress was too general, under which the court was said to be organized; (referred to acts Feb. 28, 1795; Feb. 2, 1813, and April 18, 1814: 3. The avowry did not aver by *whom the general orders were issued*: 4. It did not state that the proceedings of the court martial were reported to the officer appointing it, and were confirmed by him before sentence was executed. See ch. 200.

Mills v. Martin, 19 Johns. R. 7.

20 Johns. R. 343, Rathburn v. Martin.

2 Nott & McCord, 410, State *v.* Wakely, no prohibition lies to restrain the proceedings of a court martial for irregularities so long as it acts within its jurisdiction.

ART. 5. *Con.*

§ 1 *con.* *Quere* if a suit *in personam* in the *admiralty* lies against the owner of a ship by *material men*, furnishing supplies for her, in her *home* port, where the local law gives no specific lien on her which can be enforced by a proceeding *in rem*: 2. Clearly such suit does not lie where the owner has given a negotiable note for the debt, which is not tendered to be given up or actually surrendered at the hearing. See Lien, ch. 44, a. 3, s. 26, the General Smith.

12 Wheat. 611—643, Ramsay v. Allegra.

In the agreement of 1632, (see post,) it is declared 'if such be in the court of admiralty for building, mending, or saving, or necessary victualing a ship *against the ship itself, and not against any party by name*, but such as for his interest makes himself a party, (construed claimant;) no prohibition is to be granted though this be done within the realm. This implies if the suit be against the *person*, a prohibition shall issue. Johnson, Justice, thought this the test of Admiralty jurisdiction. See ch. 57, a. 2, s. 5; ch. 47, a. 5, s. 6: 4 Hall's Law Journal, 101.

The above question is an interesting one, for if *material men*, or those who build, repair, or supply vessels in their *home* port, (having no specific lien,) can sue *in personam*, or the person, in the *admiralty*, the trial is *without* a jury. If not in the admiralty, but at common law, then the trial is with a jury. Though the said agreement of 1632 was not a formal decision in a judicial court or an act of Parliament, so technically not an authority

yet, on every sound principle, it ought to be regarded, for it had the assent of all the twelve judges and other branches of the government, deliberately given in a great contest on an important occasion as to which every one concerned in the agreement must have read and reflected very much; and this case of Ramsay *v.* Allegra seems to leave the question unsettled, and the court had no occasion to decide it, as the intervention of the note alone afforded ample ground of decision.

According to the act of Pennsylvania, of April 1, 1803, to create a lien for work and materials, the contract must be made with the real owner of the building. 3 Serg. & R. 541.

And materials furnished *fairly* for a building, though not actually used in the construction of it, constitute a lien on it, 2 Serg. & R. 170; 2 Browne, 104: but, 275, not if furnished after the building is completed, nor if furnished for *repairing*, id; and 284, *aliter* if a main part be taken down, id. The remedy for the mechanic or material man is a special action stating his case, so that there may be a judgment against the building and lot, and not against the person of the owner. 3 Serg. & R. 541.

§ 9 *con.* The admiralty has jurisdiction of personal torts committed on a passenger, on the high seas, by the master of the ship. 3 Mason, 242–247, Chamberlain & al. *v.* Chandler.

And in admiralty proceedings, *amendments* are made on the maxim *non allegata allegare, et non probata probare*; and in the appellate court too. And not only in forms, but in matter of substance, as by filing a new count to the libel. This is permitted the parties whenever public justice, and the substantial merits require it, to introduce new allegations and new proofs: 2. If the amendment is made in the circuit court, the cause is heard and adjudicated in that court, and on appeal, by the supreme court in the new allegations; but if the amendment is allowed by the supreme court, the cause is remanded to the circuit court, with directions to permit the amendment to be made. This very important doctrine in *amendments* was asserted in the following case. The Portuguese merchant, but armed ship *Marianna Flora*, in a time of peace, on the high seas, made an attack on the United States' public armed schooner Alligator, Lieut. Stockton, with the avowed intention of repelling her approach, or to cripple or destroy her, upon a mistake, supposing she was a *piratical cruiser*, and without a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. (So held, not a *piratical* attack, under the act of congress of March 3, 1819, ch. 75.)

The Alligator captured the *Marianna Flora*, and brought

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her into Boston. Stockton, &c. libelled her in the district court, and her cargo, alleging she made a *piratical* aggression on the Alligator, against *the said act*. The district court decreed a restitution and damages, $19,675. The libellants appealed to the circuit court. Pending the proceedings in the circuit court, the libellants were allowed to file a new count or allegation, in which the aggression was stated to be *hostile*, and with intent to sink and destroy the Alligator, and in violation of *the law of nations*. It will be observed, this new count introduced, in very substance, a new ground of condemnation. The first libel was for a *piratical* aggression against the *act of congress*. This second count or libel, was for a *hostile* aggression against the *law of nations*. On the first original count, the M. F., if proved, was condemnable, in toto, for piracy; on the second held, not liable to confiscation, but not entitled to damages or costs, there being probable cause for seizing and bringing in for trial. Held, further, pirates may be lawfully captured, in peace or war, by the public or private ships of any nation; and that there is no right of search in time of peace.

11 Wheat. 1 to 56, The Marianna Flora, The Vice Consul of Portugal, Claimant.

Art. 9. *Con.*

§ 17. This was a case of seizure, for an asserted forfeiture under the ship registry act of December 31, 1792, ch. 1. The libel contained four counts on the sixteenth section, and one on the twentyseventh section of the act. The claimant was the sole owner of the Margaret. She was a registered vessel of the United States, and transferred to a Spaniard in Cuba, there to evade the Spanish duties to be retransferred to Haley. Held, this worked a forfeiture on said act, as the transfer was not made known, as the seventh section of it prescribed: 2. The act does not require a beneficial or *bona fide* sale, but a change of ownership, 'by way of trust, confidence, or otherwise,' is sufficient: 3. The *proviso* in the said sixteenth section, being by way of exception from the enacting clause, need not be noticed in the libel, it is part of the claimant's defence: 4. This *proviso* applies only to the case of a *part-owner:* 5. The trial in such case, is by the court, and not by a jury, in seizures on waters navigable from the sea, by vessels of ten tons burden and upwards: 6. The Margaret was liable to seizure on the said twentyseventh section, because she continued to use her register after she was so transferred, as using a register without being actually entitled to the benefit thereof.

9 Wheat. 421–430, The Margaret alias Carlos Fernando, Haley Claimant.

Art. 10. *Con.*

§ 5. *Prohibition.* The supreme courts in some of the States, issue this writ to inferior courts, &c., as in South Carolina. The writ of prohibition may issue on a suggestion that the cause originally, or some collateral matter arising therein,

2 Nott & Mc Cord, 174–180.

does not belong to the jurisdiction of the court to which the writ is directed, but to some other. But if the want of jurisdiction does not appear on the face of the proceedings, prohibition will not lie to an inferior court, after sentence. Vol. VI. Ch. 186. Art. 10. Con.

But this writ lies not against justices and freeholders, merely for irregularity in their proceedings, if they act within their jurisdiction. Other cases, 1 Bay, 382–434; 2 Bay, 38–18, and Const. Rep. 55. 1 Nott & Mc Cord, 502–506.

§ 1 *con.* In admiralty proceedings *in rem*, where the proceeds of the sales are brought into court, they are not liable to make good a loss sustained by the purchaser, in consequence of a defect discovered in the article sold. In this case Brazil tobacco was sold by the marshal in Maryland, to the amount of $15,495, by sample: the samples sound. The tobacco sent to Gibraltar, and there found to be so rotten that the whole sold for $4818; decided as above. Also stated the tobacco was thus rotten when sold in Maryland. The $15,495 were private Portuguese property. So the question was between private individuals, but the Portuguese owners had no part in the selling; the sale was the act of the court and its officer. The court thought the purchaser might and should have examined the tobacco before he purchased it. Art. 11. Con. 9 Wheat. 616–649. 7 Wheat. 520.

§ 11 *con.* An *injunction* that stays proceedings at law against the principal stays them against the special bail. A and his wife a *minor*, sold her land to B, and evicted him and sold to C. An injunction issued to stay in his hands enough of the purchase money to pay the prior purchaser for the buildings he erected on the lands when in possession, thinking his title good. 3 Har. & Mc H. 128, & p. 128.

§ 12 *con.* By act of congress of February 13, 1807, the judges of the district courts have as full power to grant writs of *injunction* in their districts, as is exercised by the judges of the supreme court, and under the same rules, &c., to continue in force to the next circuit court, &c. But the D. judges cannot issue this writ where the party has had a reasonable time to apply to the circuit court for it.

Land is sold with general warranty and a deed of trust given on it, to secure payment of the purchase money. If an adverse claim to it afterwards shall appear, a court of equity *enjoins* the sale under the trust deed, till such claim be decided. 1 Rand. 72, also 1 Rand. 65–71.

Where an *injunction* is refused by the chancellor in *open court*, it is competent for a judge of the court of appeals, *out of court*, to award it; and on an office copy. 1 Rand. 206–208.

See much of the doctrine of *injunctions* in the case of Osborn *v.* the United States Bank, 9 Wheat. 738 to 903; especially pages 838–845, and ch. 143, a. 4, s. 3; same case.

Vol. VI. Ch. 186. Art. 11. Can.

An injunction out of the circuit court to stay proceedings on a judgment at law in that court, may issue, though error thereon be pending in the supreme court: 2. If the district judge issue one, it expires at the next term of the circuit court, unless continued by it; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it. Was on a motion for a *mandamus* to said judges.

12 Wheat. 661—665, Parkes &c. v. Circuit Judges.

As to injunctions to stay proceedings at law, there clearly is but little certainty in the English books. They are full of different opinions; old doctrines and new, *dicta seems-so's*, *leanings*, &c. But in a few instances sound opinions are to be found. See Eden on Injunctions, edition 1822, page 326. The cases still leave it uncertain how far relief is to be allowed to a *particeps criminis*; what is a *penalty*; what *damages liquidated*, or how far the maxim holds, *ignorantia juris non excusat* in equity. The prevailing idea is, that ignorance of law does not excuse in law or equity; yet certain it is if the judge mistake the law he is excused, and very properly; for no judge yet ever existed, the most perfect one, who has not, in some cases, mistaken the law; in other words, who has not in some cases been ignorant of the law; as where he has decided the law is so, and the majority has decided against him, and where his decision has been reversed by a higher court. Still, the maxim has ever been, he is excused, and in no sense liable. Yet the maxim holds the poorest laborer to know the whole law of the land, and the most intricate parts of it, at his peril.

When the plt. files a bill for an injunction to stay trial at law, and makes *affidavit*, it is not yet settled what kind of one it ought to be. As late as 1820, we find nothing but a series of uncertainties on the subject. Thousands of such uncertainties appear to exist in the English Chancery, and increasing in the rapid succession of the high chancery officers, and in the numerous reports of all their dicta, doubts, and leanings.

There are, however, some few good cases, and founded in principle. One. The court will not continue an injunction, but on the condition the plt. applying for it, pay into court the sum found due from him by verdict, award, or by the deft's. oath in his answer; there being no special reasons to the contrary. Eden 82 to 86, and cases cited. Another case. If the answer of the déft. denies all the equity of the plt's. bill, his injunction is dissolved of course. 1 John. Ch. R. 211.

A third case. The plt. files his bill and gets an injunction, the deft's. answer obliges the plt. to amend his bill, his injunction is gone, the bill on which it issued, being altered, no long-

or supports it. 2 V. & B. 102, Bliss *v.* Boscawen, a late decision, after many doubts and variations. In such cases the plt. must revive, or the court may give him *leave to amend his bill without prejudice to his injunction.* 3 Madd. 475; Eden, 88. In New York an injunction bill, being sworn to by the plt., cannot be amended without leave. 4 John. Ch. R. 434, Parker *v.* Grant, and Rule 90th. This amending *without prejudice* is only for good reasons shown. This sound principle of late adopted, is, that the plt. shall put forth his whole strength in his first bill for an injunction, and as Lord Eldon said, the court will not give the plt. 'liberty to split and retail out his equity to apply upon another head for another injunction after the former one is dissolved.' Also 'where an injunction has been dissolved on the merits upon the answer put in whether by a decree of the court on dismissing the bill, or on motion upon coming in of the answer, or on arguing the merits, as they appear on the oath only of the deft.: if the plt. amends that bill, or files a supplementary bill with new matter, which is part of the old cause, *he cannot apply of course,* for a new injunction to stay proceedings until answer or further order.' Hereon Eden p. 91, observes 'this doctrine thus clearly and satisfactorily established has been followed in all modern cases; and no injunction which has been once dissolved, can now be revived without *special motion,* on amendments verified by *affidavit.*' James *v.* Downes, 18 Ves. 582; 2 V. & B. 101; Vipan *v.* Mortlock, 2 Meriv. 479.

Held, where *new* facts are stated in a *supplemental* bill, a fresh injunction may be awarded on motion, though the former injunction was dissolved on the merits. 4 Johns. Ch. R. 35, Fanning *v.* Dunham.

In case of amendment and to obtain a further injunction to stay proceedings at law two things are essential: 1. That the deft. be in *default:* 2. The truth of the amended bill must be verified on special motion by *affidavit,* showing the plt. could not sooner have put the *new* facts on the record. Nor p. 92. is this default confined to be in contempt, as once held in the exchequer. 2 Anst. 553; but *aliter,* 18 Ves. 522, 523; 2 Meriv. 476; see Massie *v.* Watts, ch. 225, a. 6, s. 2; ch. 226, a. 13.

§ 19. The commission given by George the Third to a vice admiral in a colony, before the revolution, was a very long instrument of nine or ten printed octavo pages, including many matters on lands and waters, and empowered him 'to take cogizance of, and proceed in, all civil and maritime causes, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchange, accounts, charter-parties, agreements, suits, trespasses, injuries, extortions, and de-

mands, and business civil and maritime whatever, commenced or to be commenced, between merchants, or between owners and proprietors of ships and other vessels, &c., &c. within his colony,' &c.; also 'to inquire by the oaths of honest and lawful men of our said' colony, 'and the territories depending thereon, and the maritime parts of the same and adjoining to them whatsoever, dwelling both within liberties and franchises as without, as well of all and singular such matters and things, which of right, and by the statutes, laws and ordinances, and customs anciently observed, were wont and ought to be inquired after, as wreck of the sea, and all and singular the goods and chattels of whatsoever traitors, pirates, man-slayers, and felons, howsoever offending, within the maritime jurisdiction of our vice-admiralty of our colony of —— aforesaid, and the territories depending thereon, and of the goods, chattels, and debts of all and singular maintainers, accessaries, counsellors, abettors, or assistants whatsoever.' So of all goods of suicides, their debts, &c. 'by sea, water, or land in our said colony of' ——, &c. forfeited, &c.; so of every kind of forfeiture; so of goods waived, flotsam, jetsam, ligan, and treasures found, or to be found; deodands, derelict goods, &c., &c.; so as to 'anchorage, lastage, ballast, royal fishes, as sturgeons, whales, porpoises, dolphins, kigge, and grampusses, and generally of all other fishes whatsoever,' of large bulk or fatness, anciently by right or custom, or any way appertaining or belonging to us,' to arrest, take recognisances, imprison, try, condemn, punish, &c., &c. In this random way the commission ran on several pages further. It extended also to 'all *fresh* waters,' ports, public streams, rivers, or creeks, or places overflown whatsoever, within the ebbing and flowing of the sea or high water,' &c.

It may have been intended to confine this commission to *the admiralty and maritime jurisdiction*, but if so intended it clearly included places within the *county lines* of a colony, as *fresh* waters, ports, creeks, &c.; and so vague are the expressions in it, that it was impossible exactly to understand what was meant by maritime jurisdiction.

This commission is so far cited to show how many rights, powers, and kinds of property the king claimed in the colonies as belonging to him; also because in this case two very unsettled questions have arisen: 1. How far does the admiralty and maritime jurisdiction extend as to place, persons, or subject matter? 2. In these numerous cases, how far does the *federal* jurisdiction extend? If we examine the journals of the old congress, from the formation of the Union in 1774, to the adoption of the Federal Constitution, which extends the

federal judicial power 'to all cases of admiralty and maritime jurisdiction,' we shall find but little on these subjects. Nor is much to be found since that constitution was adopted. So far as the doings of the old congress respected maritime matters, they were mainly confined to the cases of captures, considered in chapter 227. When the king ceased to have these rights, they accrued to the thirteen colonies. The difficult question is, what parts of them did accrue to the Union, and what parts to the thirteen colonies individually, now States? There have been scarcely any decisions on the subject. But the natural division seems to have been this—such rights and kinds of property, in these cases, as were and have been found *within the county* lines in any colony, have accrued to it, and such of them as have been found *without* those lines; have accrued to the Union. So it is understood has been, in general, the practice: in each case subject to private claims and rights. Legislation on many of these kinds of property was exercised both by England and the colonies, as *wreck*, &c. So by the Union and States. See Wreck in the index; see Property Found, &c. ch. 76, art. 7; see Fisheries, Flats, &c. ch. 68.

Vol. VI. Ch. 186, *Art.* 11. *Con.*

§ 22. This information does not lie at the suit of an individual, but must be instituted and carried on by and in the name of the State, &c.: 2. It may be filed under the direction of the court: 3. On such information against a person claiming to exercise the office of sheriff, the decision of the managers of the election is conclusive as to all matters legally submitted to them as long as that decision remains unreversed: 4. Such information may be granted against an officer commissioned under the authority of the State.

Art. 16. *Con.* 1 McCord, 32–35.

§ 23. Decided in this case that the general rules of the court as to pleadings, amending, &c. are applicable to proceedings upon an information in the nature of a *quo warranto*.

The People v. Clark. 4 Cowen, 95 to 97.

§ 24. Held, the process on an information in the nature of a *quo warranto*, is either a *venire facias* and *distringas*, or a *subpœna*, and attachment: 2. It is irregular to proceed against the deft. by a rule to appear; the attorney general had proceeded to enter an appearance for, and to take a default against the deft. pursuant to a rule obtained on an *ex parte* application for the purpose, at the last term, as in 3 Cowen's R. 357, s. 6. Moved for the deft. to set the judgment, by default, aside, as one irregular. The mover read an affidavit, shewing that no process had been served; and that he did not know till this term, when he saw the note of the case in 3 Cowen, that the subject had even been mentioned to the court; this was, as said, pursuing a citizen to judgment without due process. The statute

The People v. Richardson, Clerk of Wayne County, 4 Cowen, 97–123.

authorizing the information, requires the relator to proceed in the manner usual upon such informations, (1 R. L. 108, s. 4,) these were well known to the common law. According to that, the information uniformly prayed process against the deft., and was as above. Bac. Abr. Information D. Com. Dig. *quo warranto*. Attorney general admitted so is the practice in England. Judgment by default set aside, and the English practice adopted on argument and advisement first above stated. The court held practice without discussion of no binding force. From page 100 to 123, there is in Cowen's notes in twentythree full and fine printed pages, a very extensive collection of cases, English and American, on these informations, *quo warranto*; the substance of which are found in this chapter in art. 8 to 16, both included; also a number of cases, not noticed by Mr. Cowen.

6 Wentw. Plead. 28, &c. B. 2; 1 Salk. 374–699, same case; 6 D. & E. 594; 2 Kyd, on Corp. 404–438; 5 Binn. R. 353.

The People, ex rel. of Van Voast v. Van Slyck, 4 Cowen, 297–325.

§ 25. An information in the nature of a *quo warranto* lies against one intruding into the office of a sheriff in consequence of an unlawful decision of the county board of canvassers in his favour convened pursuant to the 10th section of the act for regulating elections passed April 17, 1822, (Sess. 45, ch. 250.) Held, 2. The duties of the board are ministerial, not judicial: 3. A *certiorari*, therefore, is not the proper remedy; special pleadings at large; some inferior points settled; many cases were cited, but the largest part of them were English.

Judgment of ouster, and that the relator recover the costs of the prosecution.

The People, ex rel. of Israel v. Tibbets, and others, 4 Cowen, 358–395.

§ 26. This remedy lies against persons who have intruded into the office of directors of an insurance company, or any other corporation; so against those who intrude into any office created for the government of a corporation. So against those who usurp to be a corporation. Not denied because the office is annual.

The people v. Niagara Bank, 6 Cowen, 196–211.

§ 27. Information *quo warranto*; much special pleadings. Important point decided was, that the bank did not forfeit its charter by insolvency, and closing their banking operations, as *before* they were prosecuted by the people, they resumed the payment of their debts. *Aliter* if prosecuted before, &c.; stopped payment five years; was decided on the act of incorporation.

The People v. the Washington and Warren Bank, 6 Cowen, 211–217.

§ 28. *Quo warranto*, &c. Held, insolvency and refusal to pay bills, &c. in specie, or other lawful money, &c. are not of themselves, within the act (Sess. 40, ch. 185,) of incorporation of said bank, a ground of such information, or other proceeding to oust them of their corporate rights. Woodworth J. said 'there must be a total *non user* to be the ground of forfeiture.' Judgment for the bank.

§ 29. *Quo warranto* on the like supposed ground of non

user, &c. Held, 1. May be against the company as a corporation: 2. The judgment is one seizure: 3. Corporate rights may be forfeited by non user or misuser: 4. To suffer an act to be done that destroys the end and object of the constitution, is equivalent to the surrender of its corporate rights. As where it fails and becomes unable to resume its business; and the people may reply such inability generally. Judgment for the people, with leave to the bank to withdraw its demurrer, and join issue. See 19 John. 456, Slee *v.* Bloom.

The People *v.* the Hudson Bank, 6 Cowen, 217-220.

CHAPTER CLXXXVII.

COURTS.

ART. 1. Con.

§ 6 *con.* The civil law is the common law of the European continent; in some degree as modified in each sovereign State, as its own circumstances have required; hence it is, properly, the ground work of their laws. So in some degree this is the case in England and in the United States. Several principles and maxims of the civil law are a part of our *State* and *federal* common law, being the old *English* common law, much modified and ameliorated in England since 1648, and especially, in the thirteen colonies, and in federal America, wherein, and in which time, it has been divested and purged of its old feudal principles, superstitious trials, barbarous punishments, dark age uncertainty, barbarous Latin and French dress, &c. &c. and made to accord, in a good measure, with the present state of civilized society, freedom, knowledge, and good feelings, in federal America. There is more of the civil law mingled in our's, than is usually supposed. The scores of *Latin* law maxims in this work, taken from the civil law, are but a very small part of such maxims taken from that law and naturalized in our own. There is most clearly enough of the civil law adopted in ours to justify law instructers to teach it very largely. Several important branches of our jurisprudence have their very foundation in the civil law, the more we examine and understand this law, the more we shall find we have adopted it by other names.

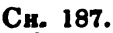
ART. 2. Con.

§ 6. What value gives the supreme court of the United States *jurisdiction*. If the replevin be of goods distrained for rent, the amount for which avowry is made is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy, so as to give jurisdiction to said court, and it has none if such value be less than $1000. In all cases of concurrent

9 Wheat. 527. pp. 532-537.

VOL. VI. CH. 187. *Art.* 2. *Con.*

jurisdiction, the court which first has possession of the subject must decide; and a court of equity is bound by such decision at law, unless there be the addition of some equitable circumstance to give jurisdiction.



See ch. 143, the jurisdiction of Federal courts in several important cases; also ch. 22, chapters relating to corporations, art. 7, post.

ART. 3. *Con.*

§ 3. Held, the circuit courts of the United States have jurisdiction, under the constitution, acts of April 3, 1810, ch. 262, s. 29, and of March 3, 1815, ch. 182, s. 4, of suits brought in the name of the postmaster-general of the United States, 'on bonds given to him by a deputy postmaster, conditioned "to pay all monies that shall come to his hands for the postages of whatever is, by law, chargeable with postage to the post master-general of the United States, for the time being, deducting only the commission and allowances made by law for his care, trouble, and charges, in managing the said office,"' &c.: 2. The postmaster-general has power to take such bonds under different acts, establishing and regulating the post office department, and especially under the act of April 30, 1810, ch. 262, s. 29, 42.

12 Wheat. 136—152, Postmaster-General v. Earles, &c.

1 Mason, 431, The Brig Hollen.

§ 4. The circuit court has no jurisdiction in causes of admiralty and maritime jurisdiction, except over the final decrees of the district court: 2. Nor has it any of suits between citizens of different States, except when one of the parties is a citizen of the State where the suit is brought. But has jurisdiction of a judgment in a State court, between citizens of different States, though it had not jurisdiction of the note, the subject of that judgment. 2 Mason, 303, Dexter v. Smith & al.

White v. Turner, 1 Mason, 521.

9 Wheat. 537-540, Mollan & al. v. Torrance.

The endorsee of a promissory note, residing in a different State, may sue in this court his immediate endorser, residing in the State in which the suit is, though the endorser be a resident of the same State with the maker of the note. See ch. 176, a. 3, s. 33.

ART. 4. *Con.*

§ 2. The district court, as a court of admiralty and maritime jurisdiction, may entertain suits for all torts, damages and unlawful seizures at sea: 2. As a court of revenue, suits for trial of property seized for violations of municipal laws: 3. As incident to this jurisdiction, may compel a redelivery of the property, and award damages for any loss of, or injury to it: 4. It may compel a seizor to proceed to adjudication as it does a captor.

1 Mason, 96, Burke v. Trevett.

1 Mason, 360, The Abby.

§ 3. When a seizure is made within a judicial district, the district court thereof has exclusive jurisdiction originally; and if the thing seized be brought into another district, the court

will remit the property to the proper district; but the cognizance of seizures on the high seas belongs to any district court of a district into which the property is brought: 2. If the seizure be abandoned no jurisdiction attaches to any court, unless there be a new seizure, but there is no abandonment, except where there is clearly a dereliction of the thing seized: 3. If a party excepts to the jurisdiction of the court he must plead to it. If he file a claim, and plea to the merits, and the parties join issue thereon, the exception to the jurisdiction is waived. In suits for assaults, &c. on the high seas no appeal lies from the district court unless there be an *ad damnum* laid in the libel exceeding $50. 3 Mason, 508.

§ 4. The jurisdiction (maritime) of the district court does not extend to voyages confined to fresh water rivers, &c. Hence, it has no jurisdiction of a suit for seamen's wages earned in a voyage in a steam vessel from shipping port in Kentucky, up the river Missouri, and back to shipping port, as a cause of admiralty and maritime jurisdiction. This extends not to contracts for the hire of seamen, except where the service is *substantially* on the sea, or on waters within the ebb and flow of the tide, and mainly so. The act of 1790, ch. 20, as to seamen, confines the remedy in this court, to such cases as ordinarily belong to the admiralty jurisdiction. 10 Wheat. 428–430, The Jefferson Steamboat.

§ 14. Act of congress, March 1, 1817, as to depositions, &c. empowers the commissioners appointed under it to take affidavits and bail in civil causes to be used in the several district courts of the United States, and to exercise all the powers that a justice or judge of any of the courts of the United States may exercise by virtue of the 30th section of the judiciary act of September 24, 1789. ART. 5 Con.

And act, March 3, 1817, provides for reports of the decisions of the supreme court of the United States, and act, May 15, 1820.

§ 23 *con.* The courts of the United States proceeding, as courts of admiralty and maritime jurisdiction, have jurisdiction in cases of maritime *torts in personam*, as well as *in rem*. 2. So proceeding, they may issue the process of attachment to compel appearance, both in cases of maritime torts and contracts: 3. Under the process act of 1792, s. 2, they proceed according to the modified admiralty practice in our own country engrafted on the British practice. Seven other rules. ART. 7. Con. 10 Wheat. 473–497, Monro and others v. Almeida, his goods, &c.

Appeal from the circuit court of Maryland. Held, on an appeal from a mandate to carry into effect a former decree of the court, nothing is before it, but the proceedings subsequent to the mandate. Rose v. Kimby reviewed. 10 Wheat. 431–449, The Santa Maria, the Spanish Consul libellant.

§ 27 *con.* United States *v.* Hudson & al. is no doubt law, especially if we do not go on implied jurisdiction. Sect. 3, art. 2, it is stated the Federal courts have a common law jurisdiction in *criminal* cases. This needs explanation. It is not meant they have such jurisdiction *quoad* the *whole* of a cause, but only when the constitution of the United States or act of congress legally gives them power over the main points of the cause; for instance, in the case of Hudson & al. no power was so given. It was a *libel* in no way, by any part of the constitution, or act of congress, brought within the cognizance of the court; but had the constitution, or act of congress empowered those courts *to try libels*, and said no more, and pointed out no mode of proceedings, then these courts, being so possessed of the *subject matter*, would have had such common law jurisdiction, whereby to proceed, then a federal court might have arrested, indicted, admitted the pleadings and evidence, instructed the jury, convicted, and fined, and imprisoned, by the rules of the common law, influenced by State statute law as far as any existed.

Wholly exercising jurisdiction over the *whole* cause, on common law jurisdiction, make the essential difference between this cause of Hudson and the cause the United States *v.* Coolidge & al. which was an indictment for rescuing a prize on the high seas, coming to Salem. Judge Story held, the circuit court had jurisdiction, and had the cause been argued in the supreme court of the United States, I think his opinion would have been confirmed, on the ground the constitution of the United States gave the court jurisdiction of the *subject matter*, it being a *maritime* cause, an offence at sea, and the constitution having given the court jurisdiction 'in all cases of admiralty and maritime jurisdiction,'—of course of this case; but left it to proceed by State and common law.

1 Wheat. 415.

If it be asked what we mean by common law, the best answer is by stating, 1. What is not common law, and 1. All law, and rules of human conduct, contained in our colony charters and constitutions is not common law: 2. Nor is any law contained in federal or State statutes, resolves or ordinances: 3. Nor are any executive orders, commands or decisions nor 4. Are any articles of war, or military orders or decisions: nor 5. Strictly speaking, are the civil law, the laws of nature and nations.

In the second place the *American* common law, as explained art. 1, s. 6, above is composed, 1. Of British statutes adopted in the thirteen colonies, or some of them, as parts of the British statutes, constituting *magna charta* applicable to the colonies; statutes *de donis*, of uses, &c. and above one

hundred others, as stated in this work, especially in ch. 196: 2. Judicial decisions received as binding law and rules of conduct, foreign or domestic: 3. Constant usages and customs, grown into such law and rules, whether commercial, local, general or others: 4. In some few cases the law of reason; one, for instance, in the sixth amendment of the federal constitution which provides 'no unreasonable searches or seizures,' shall be made. Reason alone applies this provision: 5. The fifth head above, the civil law, natural and national law is often viewed as a part of the common law.

It is believed the dread of the common law in federal America arises mainly from misunderstanding what is meant by the words 'common law.' Too generally, it is conceived, our people think by those words is meant the old English common law, containing feudal principles, superstitious trials, cruel and barbarous punishments, whereas those who praise the common law mean no such law, but such common law as is described art. 1, sec. 6, above, common law refined, softened, modified, and ameliorated, to the spirit and feelings of the present times, properly called *American* common law, *State* and *federal*. Probably nine tenths of it *State* common law.

There remains one question—What portion of federal common law have we, civil and criminal? We find federal civil common law is admitted. In more than thirty places in the federal constitution and amendments it is recognised. In the ninth amendment is a very striking instance. 'In suits at common law where the value in controversy shall exeed twenty dollars, the right of trial by a jury shall be preserved; and no fact tried by a jury shall be otherwise reexamined, in any court of the United States, than according to *the rules of the common law*.'

Indeed Virginia, the most unwearied and able opposer of *federal* common law, admits it in the instructions, &c. of her assembly to her senators, &c. in congress, dated January 14, 1800. This assembly considered the doctrine novel in its principles, and tremendous in its consequences, which taught, 'that the *common law of England* is in force under the government of the United States;' that 'it opens a new tribunal for the trial of crimes, never contemplated by the federal compact; it opens a new code of sanguinary criminal law, both obsolete and unknown.' 'It arrests, or supersedes State jurisdictions,' &c., &c. The general assembly then instructed, &c. the senators of Virginia, &c. to oppose the passing of any law, founded on the principle, 'that the common law of England is in force under the government of the United States.' Then follows the exceptions in these words, to wit, 'except-

Tucker's Blackstone, Appendix, p. 458.

ing from such opposition such particular parts of the common law as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and excepting also such other parts thereof as may be adopted by congress, as necessary and proper for carrying into execution the powers expressly delegated.'

Remarks. 1. The advocates of federal common law in criminal cases do not, and never did, advocate such novel, tremendous, obsolete, sanguinary, unknown, superseding State jurisdiction, common law of *England*, as the assembly described and opposed. Far otherwise; but only such common law as is described in this chapter, art. 1, sect. 6, and this in connexion with the 34th section of the judiciary act of September 24, 1789, and other State and federal law, daily coming into existence.

2. The assembly was on the subject of *criminal* cases, and instructed not to oppose such particular parts of the common law (meaning the tremendous, sanguinary, &c., &c. common law of England it described,) as may have a sanction from the constitution, &c. as above. Here Virginia admitted, for some purposes, in *criminal* cases, the abominable kind of English common law she described. So in the second exception she instructed not to oppose such other parts of the said abominable English common law, as may be adopted by congress, as may be necessary and proper, &c. as above, admitting the spirit of the most sweeping and objected to clause in the constitution, the clause in the 8th section, 1st article. For my part I am not willing to advocate any of such common law as Virginia supposes, and extensively admits, especially under her second exception; for by her admission therein, congress may by legislation give effect to all the powers expressly delegated, and in so doing may adopt all such parts of such common law as congress may deem necessary and proper for carrying into execution such powers. In short the federal functionaries, any more than those of the individual States, can scarcely move forward without having recourse to American common law. See art. 16, especially s. 8, art. 17 and 18.

§ 48. *Sovereignty.* This word in our lands has almost an unlimited meaning, extended from supreme sovereign power in the people, original and underived, to even the power of the husband and wife. The judges in a supreme court in South Carolina, speak of a divided empire between husband and wife, and the right of sovereignty. So 1 Mc Cord, 360: they, speaking of taxes assessed by the city of Charleston, 'say it is a part of the general *sovereign* power conferred upon the cor-

2 Nott & Mc 147—150. Sturginger & al. v. Hannah & al.

poration.' So, 1 Rand. 109; the supreme court of appeals in Virginia, say certain self-erected banks had assumed 'to exercise a high function of sovereignty in issuing bills,' &c. See this case ch. 9, a. 10, s. 1.

§ 49. *Statute of Vermont unconstitutional.* 'The society for the propagation of the Gospel in Foreign Parts' *v.* the Town of New Haven and William Wheeler. This society was incorporated by W. 3d, in England, and ever has been an English corporation, and all its members British subjects, residing in England. It had, and has power to hold lands to the amount of £2,000 sterling, *per annum*. In 1761, this society acquired a title in fee, to a tract of land now sued for in the town of New Haven, in Vermont. Oct. 30, 1794, the legislature of Vermont passed an act declaring the lands in that State, granted by the British government before the revolution to this society, 'were thereby granted severally, to the respective towns in which such lands lay, and to their use forever,' &c. Provision to recover the lands, &c., for leasing them, &c., for the support of schools. Special verdict: judgment for the society. Held, by a majority of the court, 1. That said *act is unconstitutional*: 2. That said *foreign* society had a capacity to acquire lands, and ever has had, and still has a capacity to hold them: 3. That the treaty of peace of 1783, and the treaty of November, 1794, protect the society's title: 4. That its title was not affected by the revolution: 5. Our courts will enforce the due execution of the trust: 6. The termination of a treaty by war, does not divest rights of property already vested under it: 7. Nor do treaties, in general, become extinguished, *ipso facto*, by war between the two governments. Those stipulations for permanent arrangements of territorial, and other national rights, are, at most, suspended during the war, and revive at the peace, unless waived by the parties, or new and repugnant stipulations are made. The plts. never entered on the demanded premises, &c., nor asserted their claim thereto until the commencement of this suit. Judges below divided.

Three objections were made by the defts: 1. The plt's. title ceased by the revolution: 2. Being a *political foreign* corporation, is incapable of holding lands in Vermont, on the ground of *alienage*, and their rights are not protected by the treaty of peace of 1783: 3. If so protected, still the late war put an end to that treaty, and the rights held under it, not revived by the treaty of peace of Ghent, were not so revived. No objection seems to have been made to the want of seisin. Court held this corporation to be not a *political*, but a '*private eleemosynary corporation*,' as its funds were the donations of *individuals*, and the act of Vermont was grounded on *alienage*. See ch. 225, a. 6, s. 15, ch. 1, ch. 131, &c.

Vol. VI. Ch. 187. *Art.* 7. *Con.*

§ 50. *Imprisonment for debt.* Debt on prison bond. In the circuit court, Rhode Island. Held, the several States have a right to regulate, or abolish imprisonment for debt, as a part of the remedy for enforcing the performance of contracts. The legislature extended to him the benefits of an insolvent act, passed in the year 1756; expired about 1780, was a division of opinions in the circuit court. Bonds dated March 1814; discharge in 1816: the discharge was, in fact, on the acts of 1756–1798, and the long continued usage of the State. Cited Sturgiss *v.* Crowningshield. Justice Washington dissented: he considered the discharge made on a law enacted *after* the contract was made.

Mason *v.* Haile, 12 Wheat. 370.

12 Wheat. 117 —186.

Three cases; Williams *v.* Norriss: Montgomery *v.* Hernandez, &c. and Winn's heirs *v.* Jackson, &c., all in error, and resting on the construction of the 25th section of the judiciary act of Sep. 24, 1789: several important principles settled: one page, 117, &c. Under said section, where any clause in the constitution of the United states, or any statute thereof, is drawn in question, in any suit in a State court, the decision must be against the title or right set up by the party under such clause of the constitution or statute, or the supreme court of the United States has no appellate jurisdiction in the case. It is not sufficient that the construction of the statute was drawn in question, and that the decision was against the title of the party; it must appear that the title depended upon the statute: 2. Another principle: where in such a case, the validity of a State statute is drawn in question, as being repugnant to the federal constitution, and the decision has been in favor of its validity, it is necessary to the exercise of the said appellate jurisdiction that it clearly appear that the title or right of the party depended on the statute.

It seems, on the said first principle, the party must claim a right or title under a clause in the constitution of the United States, or under a clause in a statute or treaty thereof in a State court, and that must decide against his right or title, in order he may have error to said supreme court, or said 25th section, that is, the State court must decide against his title, claimed under, or in virtue of such clause, in order that he may have error, to the end, to have his said title examined and decided on, in the said supreme court, and therein to avail himself of his title if good.

It seems on the second principle, the party must claim his title or right under a *State* statute, which is objected to as being repugnant to the federal constitution, statute, or treaty, and the State court must decide that such *State* statute is valid, in order the party denying said State statute is valid, and saying it is void as being so repugnant, may have his writ on said section.

On this second principle, many cases may be affected by the clause in the federal constitution, as *to impairing the obligation of contracts*. One case: A, under an act of the legislature of his State, builds a toll bridge, at his expense, to accommodate the public, and the act allows him to take certain toll, fifty years, as a compensation for his said expense, and being bound by law, (equal to his promise,) to keep the bridge in good repair the fifty years, &c., all which, amounts to an implied contract that he will perform on his part, and that the legislature on their part, will perform, so do no act to lessen or destroy his toll, his intended compensation, his intended *quid pro quo*. A having built the bridge, taken toll, and kept it in repair ten years, the same legislature, by statute, authorizes B to build a free bridge along side of A's, or to take half as much toll as A takes. B builds accordingly: A sues B for depriving A of his toll, to the injury of his estate in his bridge: B shows the said State statute, authorizing him to build his bridge: A replies, that State statute is void, as being repugnant to said clause on the federal constitution, and as impairing the said contract between A and the State, as to his bridge The State court decides that said statute is valid, and judgment for B. Here seems to be a fair case for A to have a writ of error on the said 25th section, and for the decision of the said supreme court, if the said State statute authorizing B's bridge, be valid or not, involving three questions: 1. Whether there is such a contract in A's case? 2. If impaired by B's statute? 3. If such a contract, and that so impaired, had the legislature, for the public convenience, or supposed public convenience, a right and power so to impair?

Though in many cases it may be very difficult to prove in courts of law or equity, that such implied contracts exist, or that they have been so impaired, or that the legislature had no right to impair them; yet often, justice and moral duty require that such questions be made and decided in the judiciary, especially as in our improved system, in which the legislative power is constitutionally limited, and this limitation is often to be defined by the judicial power, and more especially, as for a long time, it has been too much the practice for one set of men to get statutes enacted, to promote their private interest, under the specious pretence of the public good, to the injury of another set of men: such have usually been tender, paper money, and stop laws, obtained by debtors to the injury of creditors—such monopoly laws—such laws so modified, as to build up one part of the nation, to the oppression of another, such, in many countries, religious laws, exalting one set and depressing others. These few suggestions open a door to write an interesting volume, but the form of my work forbids my pursuing the sub-

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ject, therefore, I will only now observe, that toll bridges and turnpike roads, made and supported by private men or corporations, form a *peculiar* class of cases, because such proprietors are obliged by law, and at the peril of their being indicted, to keep such bridges and roads in repair, at their expense, however much the expenses of repairs may exceed the tolls received. Hence, a new road or bridge, authorized by statute, may often reduce the tolls of an old one, to be but a trifling part of the expenses of the repairs, and yet such proprietors be obliged, by law, and at their peril, as above, to make the repairs at their own expense. The injury, though more gradual, may be to them, in fact, as great as a statute directly taking away their toll, or most of it, leaving them so obliged to repair.

In the sacred administration of justice in the judiciary, in our country, no one is allowed to speak to a judge or a juror, but in *public* trials. Far less injustice would be done by legislators, if the same rules should be adopted as to them. After all, the judiciary is the place for justice, because the judges and jurors only hear, and both parties; but usually, legislators divide *pro* and *con*, and the leading ones, at least, become pleaders, rather than judges standing indifferent, especially in sectional, sectarian concerns, and in matters of *meum and tuum*: usually otherwise in legislation, prospective, and which concerns all the people alike; and see a. 21, s. 5; also, a. 21, s. 7; ch. 196, a. 1. s. 43, where decided in New York, that such a statute to allow B to build a bridge over a navigable river or creek, only protects *him* against an *indictment*, not against the actions of persons *insured* by such building: this is the true distinction: the government may waive its right to prosecute, but cannot authorize private property to be taken, injured, or destroyed, especially without compensation. Like principle ch. 196, a. 1. s. 43.

§ 52. Federal jurisdiction and State rights, as to commerce among the several States. Decisions in several important cases in Federal and State courts, as follows in this section. Case March, 1824, Gibbon *v.* Ogden, 9 Wheat. 1 to 240; as to steam boat navigation on the Hudson, and held, 1. The statutes of New York granting to Robert R. Livingston and Robert Fulton, exclusive navigation of all the waters within the jurisdiction of that State, with boats moved with fire or steam, for a term of years, are repugnant to that clause of the constitution of the United States which authorizes congress to regulate commerce so far as the said statute prohibits vessels licensed according to the laws of the United States, for carrying on the coasting trade from navigating the said waters by means of fire or steam: 2. The power of regulating commerce, extends to the regulation of navigation: 3. It extends to every species of commercial intercourse between the United

States and foreign nations: and among the several States: 4. It does not stop at the external boundary of a State; but it does not extend to a commerce which is *completely or entirely within a State:* 5. The power in congress to regulate commerce, is general, and has no limitations but such as are prescribed in the constitution of the United States: 6. This power, so far as it extends, is *exclusively* vested in congress, and no part of it can be exercised by a State: 7. State inspection laws, health laws, and laws for regulating the internal concerns of a State, and those which respect turnpikes, ferries, &c., are not within the powers granted to congress: 8. The laws of New York, granting to R. R. Livingston, and R. Fulton, the exclusive right of navigating the waters of that State with steam boats, are in collision with the acts of congress regulating the coasting trade, which being made in pursuance of the constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance to powers acknowledged to remain in the States: 9. A license under the acts of congress for regulating the coasting trade gives permission to carry on that trade: 10. The license is not merely intended to confer the national character: 11. The power to regulate commerce extends to navigation carried on by vessels exclusively employed in transporting passengers: 12. So it extends to steam vessels, as well as others.

1 Hop. Ch. R. 149 to 212, the Steam Boat Company *v.* John R. Livingston, May 1824. The same principles were adopted in the chancery court in New York, but in different words and with the addition of many more in detail. Gibbon *v.* Ogden, s. 20, this article; 4 Johns. Ch. R. 416–571, Livingston *v.* Tompkins; 5 Johns. Ch. R. 250; the North River Steam Boat Company *v.* Hoffman, 5 Johns. Ch. R. 300; and Gibbons *v.* Ogden in error, 17 Johns. R. 488. All these cases, at great length, respecting this steam navigation in the waters of the State of New York. The chancellor seems to rest the authority of the Union, in these cases, not only on its power to regulate commerce, but also on its power to assess and collect taxes and revenue. This case *of the Steam Boat Company v. Livingston,* was carried by appeal to the court of errors. And the decree of the chancellor affirmed, 22 to 9. Savage, C. J. one of the 22, delivered their opinions and approved of the decision of the supreme court of the U. States, in the foregoing case of Gibbons *v.* Ogden, pages 739 to 756 and p. 750. The chief justice said, 'in my judgment, then, the case of Gibbons *v.* Ogden, decides that the commerce subject to the control of congress, is the coasting trade, which includes the transportation of passengers; that the coasting

3 Cowen, 712–756.

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trade may be lawfully carried on by licensed vessels, in all the navigable waters of the United States, including all rivers approachable from the coasts. If this be so, the Olive Branch was engaged in a lawful trade, and had a perfect right to the navigation of the Hudson. The Olive Branch was the steam boat in question, in this case; Steam Boat Co. v. Livingston, sailing between the city of New York and Albany, by the way of New Jersey. An injunction to prevent her pursuing this indirect intercourse, was denied in chancery, 1824. In the court of errors, in February 1825. Gibbon's case was March 1824.

Savage, C. J. added and said in substance, the power given to the general government are to be first satisfied. Some of these are exclusive, some concurrent, in which last case, the provisions of the general government are paramount. But congress has no right under its powers to regulate commerce, to interfere with the ferries of the State, except so far as they are used for carrying on the coasting trade. Nor can congress interfere with the navigation on our canals, for they are not navigable waters, within the meaning of the constitution. So of our inland lakes and rivers. But congress may, under their taxing powers, tax canal boats or any other property. The authority of congress to regulate navigation, is confined to our coasts, bays, and navigable rivers. These opinions it will be observed, are in conformity to the decisions in Gibbons v. Ogden, and clearly very correct; and in strict conformity to all the acts of congress, respecting commerce and the coasting trade, enacted since the federal constitution was adopted.

§ 53. Virginia resolution February 1827, by her legislature, 'Resolved, that this assembly does most solemnly protest against the claim or exercise of any power whatever on the part of the general government *to protect domestic manufactures;* the protection of manufactures not being among the grants of power to that government, specified in the constitution of the United States.'

February 1827, this power had been exercised fortyeight years, without dispute, in the regulations of commerce, and in the laying of the duties of impost. If Virginia be right, foreign nations may enact what laws they please to destroy our manufactures, and we cannot retaliate; for if the general government cannot, clearly no other power in the nation can. See a. 20, s. 13.

Federal jurisdiction relates to the commencement of the suit and the residence of the parties at that time. 9 Wheat. 537.

10 Wheat. 192—204. The federal courts are of limited jurisdiction. Hence it must be stated in their proceedings. If not so stated, their

judgments and decrees may be reversed for that cause, on error or appeal; but till so reversed they are conclusive evidence between the parties and privies. But the circuit and districts courts, are not for these reasons inferior courts, in the technical sense of the words, whose judgments taken alone, are to be disregarded. See also 5 Cranch, 185, and 6 Cranch, 267.

As to the power of congress to enact laws to protect or promote manufactures, not regarding revenue, an important question has been raised; and not only Virginia, but near all the slave-holding States, have denied congress has this power. The denial, generally, has been in consequence of the passing of the tariff act, in 1828. The better opinion, clearly is, that congress has the power; but in its nature is a power to be exercised with great caution. The prosperity of manufactures depends on skill, this depends on individuals, their education and experience, not on acts of congress: 2. On capital, not on borrowed money: 3. Economy: 4. Foresight and sound calculations. If either of these essentials be wanting, the business must fail, and all the acts congress can pass, will not avail. It is undoubtedly true, as a general principle, it is best to let every branch of business grow up on its own strength. If an individual has not capital enough, a corporation of several persons supplies this deficiency. Generally, acts of legislatures, to force any branch of business, are evils; they force a premature growth, and often induce unfit persons to plunge largely into the business on borrowed money, to its ruin; for to meet their loans, generally, they must and will force sales at a price so low as to ruin the business. So is experience.

§ 8. The court of common pleas has no jurisdiction of an offence created by statute, unless it is made cognizable in that court. The offence indicted, was carrying away two logs. The Maine stat. 1821, ch. 168, made the offence cognizable in any court of competent jurisdiction. See Commonwealth *v.* Knowlton, ch. 68, a. 4. s. 9. Art. 12. *Con.* 2 Greenl. 331.

§ 6. This court, in money matters, represents the county, and its doings are binding on the inhabitants thereof, and in its prudential concerns. 16 Mass. R. 76–90. Art. 13. *Con.*

§ 15 *con.* See *coram non judice*, ch. 75, a. 4, s. 4, &c. Justice's court has no jurisdiction of the action of account. 18 Johns. R. 131. Art. 14. *Con.*

The justice may sign a summons in blank and deliver it to the party to fill up in the presence of the justice and under his control; and this is no violation of the act of April 1, 1820, s. 4. People *v.* Smith, 20 Johns. R. 63. Under the act of April 18, 1818, if the demand exceed $25, either party may

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have a jury of twelve; but it must be demanded before the *venire* issues, so that twenty may be summoned. Strong v. Beardslee, 18 Johns. R. 130. When the party may be considered as waiving the trial by jury in the justice's court. Coon v. Snyder, 19 Johns. R. 384. Issue is joined, and the justice adjourns his court to another day, and he waits a full hour after the time appointed for the parties to appear, (deemed reasonable time) after this he may proceed to call them, and give judgment against the party neglecting to appear. 2 Johns. R. 309.

The common law practice of surrendering bail, does not apply to a justice's court. 19 Johns. R. 194.

A cause is appealed from a justice's court to the common pleas. It cannot be referred, but must be heard and decided on the proofs offered in the justice's court. 20 Johns. R. 303.

§ 21 *con.* Justice's court is not of record; no need of a seal to his return; liable for a false return without one; under his hand is enough. 1 Cowen, 212.

§ 25 *con. Justice's courts in Pennsylvania.* His office, during good behaviour, subject to the implied condition he remain in the county named in his commission. 4 Yeates, 399.

The office of associate judge of the common pleas and justice of the peace, are not incompatible. 4 Serg. & R. 276.

An action of *assumpsit* on the warranty of a horse, is within his jurisdiction under the acts of March 1, 1745, and April 19, 1794. 1 Serg. & R. 413. But he has no jurisdiction in suits to recover damages for assault and battery. 4 Yeates, 127. Has jurisdiction in cases of tort, when the plt. waives the tort, and sues on an implied contract. 1 Yeates, 248. So in torts when referees ascertain the damages. 1 Yeates, 77. He has jurisdiction beyond $100, only when the parties agree on the sum, or leave it to him to ascertain it. 1 Serg. & R. 27.

The justice has jurisdiction if the plt. aver his damages do not exceed $100, though it appear on the record the plt. has stated his cause of action generally. 1 Serg. & R. 19.

An appeal lies from his judgment on a *scire facias* on a judgment obtained. 3 Serg. & R. 93.

3 Serg. & R. 144; 1 Serg. & R. 19, 290, 309.

The cause of action must exist when the suit is commenced, and cannot be varied by any subsequent event, as to the amount of the debt. It is error if in the appeal from a justice the issue be tried in the names of different parties from those in which the appeal was entered. 5 Serg. & R. 544.

The act of March 21, 1772, allowing a justice to be sued after thirty days' notice in writing, for anything done in his office, is to be liberally construed for his protection, and if he act honestly, though mistaken, thinking he is doing his duty, though acting without authority, he is protected by the act.

§ 26. Justices of the peace in Kentucky; their jurisdiction. He has original and exclusive jurisdiction in all cases of attachment not exceeding $50, founded on specialty, bill, or note, in writing, or account; but not in contracts for payments above $50, except where payments have been made and endorsed so as to reduce the sum due to $50. Have not jurisdiction unless the contract be for the payment of money, where the sum is above £5, and under $50. 3 Litt. 462.

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Owens v. Starr, 2 Litt. 235.

§ 3. 1 Rand, 211–212. The judgment of a competent court is deemed right, until regularly reversed.

§ 9. See art. 1, s. 6; art. 7, s. 27. The common law of England, as it had been improved in England, and as it had been adopted, modified, and improved in the thirteen colonies, and was in force in them when declared independent, yet remains in force with some further ameliorations in every State and territory, navy yard and federal place, (Louisiana, and perhaps Florida excepted.) So far as it has not been repealed, altered, or superseded by some constitution, statute decision, or usage grown into law, here established, enacted, made, or admitted. It is a first and invariable principle, that law once established in any territory, remains in force, as titles to property do, until altered by proper authority.

10 Wheat. 1–5, Wayman & al. v. Southard and another.

§ 10. *The said 34th section explained.* Held, Congress has by the constitution, exclusive authority to regulate the proceedings of the courts of the United States, and the States have no authority to control those proceedings, except so far as the State process acts are adopted by congress, or by the courts of the United States under the authority of congress: 2. Proceedings on executions and other process in the courts of the United States, in suits at common law, are to be the same in each State, respectively, as were used in the supreme court of the State, in September, 1789, subject to such alterations and additions as the courts of the United States may make, or as the supreme court of the United States shall prescribe by rules to the other courts: 3. State law regulating executions enacted subsequent to September, 1789, is not applicable to executions issued on judgment rendered by the courts of the United States, unless expressly adopted by the rules and regulations of those courts: 4. The 34th section of the judiciary act of 1789, ch. 20, which provides 'that the laws of the several States,' &c. shall be regarded *as rules of decision* in trials at common law, in the courts of the United States, in cases where they apply, does not apply to the process or practice of the courts. It is a mere recognition of the principles of universal jurisprudence, as to the operation of the *lex loci*: 5. The statutes of Kentucky as to executions, as to paper money, &c. are not applicable to executions issued on judgments rendered by the courts of the

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United States. The court, the power of congress to regulate proceedings as first above stated, is too clear to be questioned. That congress had done it, appears in the sections 13, 14, 17, and 18 of said act of Sept. 1789, ch. 20; and that sect. 14 included executions, as executions are writs; so sections 18, 24, 25, and the process of Sept. 29, 1789, ch. 21, s. 2; and Robinson *v.* Campbell, above. The *State* laws on the 34th section mentioned, only furnished 'a rule of *decision* in *trials* at common law.' 'Where they applied,' not in cases of execution and other proceedings not *litigant*, not involving *decision*, not *trials* at common law. See act of congress, May 8, 1792, ch. 61; act of congress of 1793, March 2d, ch. 66, s. 7, Palmer *v.* Allen, 7 Cranch, 550, reviewed; s. 7 of the said act of 1793, and s. 17 of the judiciary act of 1789, prove congress may delegate to others powers it may itself exercise as to courts, to regulate their practice as is done in said two sections, yet no doubt congress could itself enact laws to regulate such practice.

10 Wheat. 51–96, U. States Bank *v.* Halstead.

§ 11. *Federal executions; how independent of State laws.* Held, 1. The statute of Kentucky, of December 21, 1821, prohibiting the sale of property taken on executions for less than three fourths of its appraised value without the owner's consent, does not apply to a *venditioni exponas* issued out of the circuit court for the District of Kentucky: 2. The laws of the United States authorize their courts so to alter the form of the process of execution used in the supreme courts of the States in 1789, as to subject to execution lands and other property, not thus subject by State laws in force at that time. The acts of Congress cited in the 10th section above, were principally relied on.

ART. 17. *Con.*

§ 23. Restrictions on State power as to private property. This is generally understood restrictions on legislatures: 1. By constitutions: 2. Fundamental principles of common law, as found in Magna Charta Bill of Rights. Petition of Rights, &c. [16 Mass. R. 36, Angel Mar. Apr. 1829, cases collected.]

ART. 18. *Con.*

§ 113. 'Judicium semper pro veritate accipitur.'

§ 114. Ei incumbit onus probandi qui dicit.

§ 115. Nemo plus juris in alium transferro potest quam ipse habet.

§ 116. Nemo allegans suam turpitudinem est audiendus.

§ 117. 'Aliquis non debet esse Index, in propria causa; imo, iniquum est aliquem suæ rei esse judicem.'

§ 118. Falsa orthographia non vitiat chartam.

§ 119. Falsus in uno falsus in omnibus.

§ 120. Debitor non præsumitur donare.

ART. 20. *Con.*

§ 2 *con.* Same principle in New Hampshire. Held, an act of the legislature awarding a *new trial* in an action, which has been

decided in a court of law, is an exercise of *judicial* power. It is also in its operation *retrospective*, and for these two reasons is unconstitutional. Was in a probate cause finally decided in the superior court in Nov. Term, 1813. Merrill moved in that court for a new trial, which was refused, after a full hearing; and Nov. Term, 1814, final judgment rendered. Merrill then petitioned the legislature for another trial, and Jan. A. D. 1817, it granted one, to be like the common cases of review.

1 N. H. Rep. 199–217, Merrill, admr. v. Sherburne & al.

Same principle, 5 Pick. 65–77, Picquet's case.

Same principle settled in Maine. Supreme judicial court there decided the legislature of the State had no power, by the constitution, to pass any act or resolve, granting an appeal or a new trial in any cases between private citizens, or dispensing with any general law in favour of a particular case. 3 Greenl. 326—337, Lewis & al. *v.* Welsh. See ch. 122, s. 2, King *v.* Dedham Bank; 2 Greenl. 275; same, 1 N. H. Rep. 199–217, cannot grant a trial.

4 Pick. 314, Dedham Bank v. Chickering & al.

Held, the provision in Mass. Stat. 1816, ch. 91, that no bank shall issue any bill, &c. payable at any other place than the bank, &c. for any sum not exceeding $100, is *constitutional*, as applied to banks incorporated *before* the statute was enacted.

4 Pick 460—465, Commonwealth v. Breed.

Information in the nature of a *quo warranto*, filed by the direction of the legislature, against the deft., for building a 'bridge across a navigable arm of the sea, between Chelsea and Belle Island, whereby the passage of vessels is obstructed,' &c. The deft. pleaded the statute 1816, ch. 31, by which he was authorized to build, &c. Held, 1. The act authorizing such bridge is constitutional: 2. The legislature is to determine when the public convenience and necessity require such obstruction to navigation, and on what terms and conditions it shall be allowed: 3. If a private act of the legislature may be avoided, on the ground it was obtained through fraud, the question of fraud is to be determined by a jury, and if fraud does not necessarily result from the facts found by the jury, it will not be inferred by the court: 4. When the legislature authorizes an individual to build over navigable water, with a draw not less than 15 feet wide, he is not bound to make it wider than 15 feet, though vessels of a greater breadth had been accustomed to sail in such water, nor to make a wharf or pier to the draw, a wharf or pier not being an essential part of a draw: 5. Where the charter imposes on the proprietors of a bridge a penalty for unreasonably neglecting to raise the draw, such neglect will not operate as a forfeiture of the franchise.

Two statutes of Kentucky unconstitutional, as decided 8 Wheat. 1 to 108, Green & al. *v.* Biddle; to wit, acts of Feb 27, 1797, and Jan. 31, 1812, both as violating the compact between Virginia and Kentucky, of Dec. 18, 1789; in which,

among other things, it was provided, that 'all rights and interests of lands, derived from the laws of Virginia, shall remain valid and secure, and shall be determined by the laws now existing in this State,' (Virginia.) This compact was ingrafted into the constitution of Kentucky, and consented to by congress, though Mr Clay argued, there was no such consent, so the compact was void. The laws of Virginia, Dec. 18, 1789, as to land titles, rents, and profits, and improvements, were generally the principles of the common law: hence, the court held, by the common law, the statutes of Virginia, the principles of equity, and the civil law, the claimant of lands, who succeeded in his suit, is entitled to an account of the mesne profits received by the occupant, from *some period* prior to the judgment of eviction or decree, therefore, the occupant was accountable to the true owner for the rents and profits, on these principles. The two statutes of Kentucky were in violation of these principles, for they excused the occupant from so accounting before actual notice, and partially after, and subjected the owner to allow for *improvements* made by the occupant, all under various modifications. In substance, these two statutes varied materially from the laws of Virginia, as they were Dec. 18, 1789, in favor of the occupants, and against the owners, and directly impaired the obligation of the said compact or contract between the two States; a contract not to be impaired by the constitution of the United States.

§ 13. As in this general abridgment of American law, it is properly intended to notice every breach of it, whether constitutional, statute or other: and as in the occasional notes and comments it is properly intended to examine, very concisely, a few important parts of this law; and as some very recent proceedings, as published in *Virginia*, *South Carolina*, and *Georgia*, respecting *State rights* and *State sovereignty*, demand the serious attention of every man in the United States, I need make no apology for adding a few remarks on the subject; but as a full examination cannot be made, even in a volume, and much as to these rights and this sovereignty, is already stated in this work, I shall confine my remarks, mainly, to the tenth section in the first article in the federal constitution, which, in a special manner abridges and limits State sovereignty, and which section is in these words, to wit: 'No State shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal: coin money; emit bills of credit; make anything but gold and silver coin a tender in payment; pass any bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts, or grant any titles of nobility.'

'No State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be abso-

lately necessary for executing its inspection law; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No State shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace; enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded or in such, imminent danger, as will not admit of delay.' Many other parts of this constitution limit State power and sovereignty, which will be recollected.

§ 14. In the proceedings in the *Virginia* legislature, in Feb. 1829, on the tariff subject, it was resolved, 'that there is no common arbiter to construe the constitution of the United States, the constitution being a federative compact between sovereign States, each State has a right to construe the compact for itself.' This legislature then declared its deliberative conviction that the acts of congress, usually denominated the tariff acts, are not authorized by the plain construction, true intent and meaning of the constitution. About the same time, on the same subject, the legislature of Georgia resolved, that as one of the contracting parties to the federal constitution, and possessing equal rights with the other contracting party, she will insist on her construction of that instrument, and will submit to no other. By the other contracting party, in the singular number, Georgia must mean the United States or Union.

Several questions arise: 1. Is the federal constitution a *compact* or *contract agreed to*, and made by two or more parties, or is it a *constitution ordained* and *established* by the people of the United States, as a nation? 2. Is there, or is there not, a *common arbiter* to construe it? 3. Has a State a right to construe it for itself, to insist on her construction, and to refuse to submit to any other construction? 4. If a State has this right to construe, where is this right placed in her *judiciary*, or in her legislature?

If this State right exists, it exists in each of twentyfour States; and if deliberate conviction so lead them, they may construe this constitution in twentyfour different ways, and if there be no *common arbiter*, all the different constructions must be constitutional, and stand firm. Even the old confederation provided a common arbiter, which, finally, decided and settled the Wyoming dispute between Connecticut and Pennsylvania, and other disputes.

§ 15. I will venture to assert, that the constitution of the United States, is not a *compact*, or *contract agreed to* by two or more parties, to be construed by each for itself, and here stop for the want of a common arbiter to revise the construction

of each party or State. But that it is, as the people have named and called it, truly, *a constitution;* and they properly said 'we, the people of the United States' 'do ordain and establish this constitution,' and not we, the people of *each State.* If a contract, when and how, did the Union become a party to it? If a compact, why is it never so denominated, but often, and invariably, in the instrument itself, and in its amendments, styled *this constitution?* and if a contract, why did the framers and the people call it the *supreme law?* A constitution, State, or federal, is a thing *constituted,* an instrument *ordained and established.* If a committee frame a constitution for a State, as for Connecticut, and the people thereof meet in their several counties, and ratify it, it is a *constitution, ordained* and *established,* not a *compact* or *contract* among the several counties; so if they meet in their several towns, and ratify it, it is not a compact among them. A compact among States is a *confederation,* always so named, as was the old confederation, and never a *constitution.* The words federal *constitution,* were first used in the old congress, in assenting to the federal convention, which framed the constitution. In a confederation among States, the name of each is preserved: so in treaties made under one, as in our treaties with France in 1778, and with Great Britain in 1782, and 1783; not so in treaties made under the constitution. In the time of the confederation, the several States were known to foreign nations, not so in the time of the constitution. In the confederacy, acting under the confederation, each State was distinctly noticed and named; not so under the constitution. The distinction is material under the confederation; the several States were more sovereign, and acted *severally,* as thirteen States. Under the constitution they are far less sovereign, and do not act so, except in mending the constitution. If each State be now sovereign, in the true sense of the word sovereign, its sovereignty is very much limited, as appears in the said tenth section, in other parts of the constitution, and in various cases and decisions stated in this work; so much so, that it can make, without the consent of congress, no compact with another State, or with a foreign State, nor is it legally known to it: it cannot engage in peace or war, without such consent, but in a special case: it has no sovereignty on the ocean; nor has it any in the numerous cases in which its sovereign power has been transferred to the union, as in regard to post-offices, bankruptcy, naturalization, and scores of other cases.

Nor was a legislature a party to the adoption of the constitution.

§ 16. Is there a *common arbiter* to construe the constitution? This question involves two questions: one, is not the power to construe the constitution a *judicial* power? and another, if *judicial,* where is it placed in the last resort? Most clearly, it

is a *judicial* power, so belongs not to congress or the legislatures, in the cases in question, *finally* to be exercised. The power to decide in the last resort, that an act of congress is constitutional or not, is clearly *judicial*, and has been so exercised by the judiciary, federal, or State, in scores of cases stated; and this is manifestly correct, for if a State judicial court misconstrue the federal constitution, an act of congress, or treaty, or a State statute, in several cases, the State decision can be, and has been for forty years, corrected in the supreme court of the United States, in the proper cases; and thus, the desirable uniformity of decision has been produced throughout the nation, and the national character preserved, at home and abroad. But if State legislatures can make decisions, constitutionally, in these cases, there may be as many different decisions of the same question, as there are States in the Union, and their decisions must remain, however diverse or contradictory, as there is no way to get such *legislative* decisions into the supreme court of the United States, or into any federal forms so as to produce the uniformity of decision desired, and so essential. A legislative decision in the last resort, must be as novel as it is untenable.

§ 17. By the constitution of the Union, art. 3, the *judicial* power of the supreme court of the United States, extends 'to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority.' Beyond all question, the tariff acts of congress are laws or cases arising under the constitution, and the question is, if they are constitutional or not; or, in the Virginia form of expression, does the constitution authorize them, expedient or not. This case is, in principle, precisely that of the United States' Bank, stated in this work. Congress and the president, passed the act creating that bank: some State legislatures thought it was unconstitutional, and some taxed it, and by State officers, collected the taxes: suits were brought against them in the *judiciary*, not in legislatures. Some State courts decided against the tax, and thought the bank act was not constitutional. The causes were carried into the supreme court of the United States; that court decided the act was constitutional, and since the bank has quietly proceeded: all *pros* and *cons* agreed to give the case the *judicial* course: and how is it possible, in the last resort, to have decided and settled the case in a constitutional manner, in any other way? The most zealous advocates for State rights and sovereignty, never contended the question could ultimately be decided in State legislatures, or by congress, or by State or federal executives, or anywhere, but by the coordinate branch, the *judiciary*, State, or federal. This settles one material point, which is, that the power is *judicial*.

§ 18. Now let us follow the question into practice, and we come to the same result. Some think the tariff act of 1828, is

constitutional, some not. In Georgia, for instance, the federal collector demands payment of the import duties, created by the act, of the importer: he refuses to pay them, thinking the act is not constitutional: the collector proceeds on the ground the act is constitutional: what is the next step in legal order? the importer is prosecuted in the *judiciary*, State or federal, surely not in the legislature. Does not the cause, in regular order and necessarily, get into the *judiciary*? As the legislature of Georgia has declared it will submit to no construction of the constitution of the Union, but its own; to act in character, it must enact laws, empowering the executive of Georgia to resist by force, the federal collection, or leave the prosecution to take its *judicial* course: if to resist by force, we have a precedent, acquiesced in by all twenty years, with the doings in the Virginia legislature, in the case as published, thus: 'supreme court of the United States in 1819, a collision happened between the general government, and the State of Pennsylvania, in the case of Olmstead against Rittenhouse's executors: Governor Snyder ordered a detachment of the militia under General M. Bright, to take the field, and resist, by arms, the execution of the process of the United States court, by the marshal. The marshal, however, summoned the *posse comitatus*, and executed the precept. General Bright and his army were indicted, convicted, and marched to gaol.'

The legislature of Pennsylvania, to prevent future wars of the sort, proposed an amendment to the constitution of the United States, similar to that lately brought forward in the senate of the United States, by Mr J———, of Kentucky, and requested the assent of the other States. Among others, it was communicated to Virginia, in whose legislature the following report was made.

Virginia legislature—House of Delegates—An amendment of the constitution.

Thursday, January 11, 1810.

The committee to whom was referred the communication of the governor of Pennsylvania, covering certain resolutions of the legislature of that State, proposing an amendment to the constitution of the United States, by the appointment of an impartial tribunal, to decide disputes between the State, and federal judiciary, have had the same under their consideration, and are of opinion, that a tribunal is already provided, by the constitution of the United States, to wit: 'The supreme court, more eminently qualified, from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal which could be erected.' The inference seems to be, that the legislature was satisfied with this report, if it did not, in form, adopt it; as it does not appear it concurred in the amendment.

It is believed, that every State in the Union, in the last forty years, has expressly or impliedly admitted this court is this common arbiter.

§ 19. But the ardent advocates of State rights and sovereignty have said, that they claim no more State power than Massachusetts, (then including Maine) Connecticut and Rhode Island exercised in the last war: their case was thus: in the year 1812, the executive of Massachusetts and her *judiciary* decided the great militia question for herself, against the president: this decision produced a collision between him and those States. If Virginia, and especially Georgia, be now right, Massachusetts then had a clear constitutional right, to make the decision so much condemned in some other States. This decision, was, in fact, made by her *judiciary*, and not by her legislature; and she was responsible only for the honest exercise of her power: she never declared, as Georgia has, that she would submit to no construction of the federal constitution but her own. 8 Mass. Rep. 549—554.

Massachusetts stood on different and better ground than the States which have assumed to decide by the *legislatures*, that an act of congress is not authorized by that constitution. If the Virginia legislators say they only expressed an opinion, those of Georgia cannot say this. Massachusetts construed the constitution in *her judiciary*, before any opinion had been given by the supreme court of the United States, and the decision was confirmed by her executive, called upon to act in the case. Had this judicial decision been made in an action at law, or in equity, it might have been carried to the supreme court of the United States. Further, her decision was against that of the federal *executive only*. Had said supreme court, at the time, confirmed the president's decision, or made one like it, every decent lawyer in Massachusetts and Maine would have held the federal decision binding and conclusive, for so they have ever held. If Georgia, and even Virginia, be right, what tremendous consequences must follow? If the general government make a treaty or enact a law, any State legislature in the union may declare that it is not authorized by the constitution, put down its foot, and say, we have made our construction and we will submit to no other, and there is no judge above us, no appeal; and if there shall be an attempt to enforce an execution, we have a right to stand by our construction and to support it by arms. Another State legislature decides the treaty or law is constitutional, and twentyfour States decide *pro* and *con*, and crumble to pieces in torpidity, or get into a war, and fall into such fragments as the petty states of Italy, Greece, &c. were in of old, when men seem to have been incompetent to govern more than a village. If

such State power exists, may not foreign nations, not inclined to treat with the United States, taunt at them, and ask, as some did in the days of the confederation, if we make a treaty with the federal government, will not States so construe the federal constitution as to defeat the treaty?

§ 20. As to the dissolution of the Union in the late war, history will show that the conduct of the eastern States affords no kind of precedent for the new southern doctrine of construction. Neither they or their convention had the least hostility to the Union, but their opposition to the then *administration of federal affairs* was misrepresented by some, and mistaken by others for opposition to the *Union*. In the then high excitement and party spirit, the administration and Union were often confounded by ignorance or design. The opposers of the convention did not for a long time, if ever, publish its commission or its doings; and as they usually read only their own side, they read but little except charges against it and the States which appointed it. Another mistake was in thinking they went with the then excitement. The fact was, moderate men saw the excitement was going too far and that it was leading to evils far greater than the war itself. Though the moderate friends of those State measures did not like the war, they had a deep interest in the efficient defence of the country, and in the preservation of the Union, and but few men more than the members of the convention. Some opposers of the convention have published that some of the members suffered themselves to be elected to prevent rash measures and mischief to the Union. The fact was, before it was known who would be the members, such was the excitement and discontent with federal measures, that cool men and firm friends of the Union, deeply interested in its preservation, had some fears on this head. This fear was soon done away by two circumstances: the Massachusetts commission and circular letter, deemed perfectly sincere, directed the delegates to propose means for the defence of the eastern States, and amendments of the constitution, but in a manner '*not repugnant to their obligations as members of the Union.*' Another circumstance, a number, if not a majority of very aged moderate men, living in retirement were elected members: both tending to allay the spirit that might have ripened into some violent measures. I need not add on this ground, knowing the intentions of the members, I know the fears of evil to the Union had no foundation. It was the administration they disliked, not the constitution or Union.

As to the *constitutionality* of the convention, some opposed to it, but confiding in its members, thought, and probably still

think it was unconstitutional, and more, that it was inexpedient. As to *expediency*, this work is not a place for its examination, but is as to its *constitutionality*. A late governor of South Carolina, in his public message to the legislature, stated his opinion that this convention was in violation of the said tenth section, providing, as above, that *no State shall without the consent of congress enter into any agreement or compact with another State.* The governor does not appear to have understood that nothing was intended to be concluded without that consent, the case no doubt with many. On this consent all rests in case of a compact. With it an agreement completed among two or more States is constitutional, but without not so. On the one hand this provision clearly implies a State may make a compact with another State, with the consent, or confirmation of congress. On the other, this tenth section and other parts of the constitution limit State sovereignty as much or more than colonial sovereignty was in fact limited under the king. Colonies entered into a compact in 1643, which continued about forty years, as to which their charters were silent. It does not appear that the king assented or objected to the compact. In 1754 colonies entered into a compact, but then it seems it was understood the assent of the parent State to it was to be obtained. The question occurs, did the three States act on the principle of this tenth section in 1814? If they did, and meant a compact, they acted constitutionally. Now if men will read all their doings, those of the convention, and attend to the mission to congress for its consent, they will see their whole business was conducted in conformity to this section, even if *a compact* was intended.

§ 21. As to the main object, *eastern defence*, congress about the time indirectly approved these doings; for congress passed an act providing, in the first section, 'that the president of the United States, be, and he is hereby, authorized and required to receive into the service of the United States any corps of troops, which have been, or may be, raised, organized, and officered, under the authority of any of the United States, whose term of service shall not be less than twelve months, which corps, when received into the service of the United States, shall be subject to the rules and articles of war, and be employed in the State raising the same, or in an adjoining State, and not elsewhere, except with the assent of the executive of the State so raising the same.' Most clearly if this act had been passed five months sooner there would have been no convention, and no difficulty as to eastern defence; for as to the amendments proposed, though deemed

valuable in themselves, there was so little prospect of their adoption they were a small object. The expediency or inexpediency of such a convention I leave and refer to the doings in 1814. It is enough in this work to state the grounds on which a convention of States may be constitutional under this tenth section. This convention, as intended, moderated and checked an inflamed, growing opposition to the then administration of federal affairs, though not directed against the Union, yet might, in the then violence of party spirit, have in time embarrassed and shaken that Union. As to the enemy, all, even the most excited, were disposed effectually to resist him in all parts of the war. No man has been named as inclined towards him.

Though I hold the said section legally authorizes such a State compact, congress consenting; yet it must be allowed that such compacts and conventions ought to be admitted with the greatest caution, and only among States friendly to the Union of all the States, as such local compacts prepared by conventions, agents, or committees, met together, may, in the course of events, materially tend to impair or dissolve the Union. When States intend so to agree, it seems almost of course to appoint agents, committees, or delegates to prepare the agreement.

§ 22. Thus far, to have a fair view of the said tenth section, supposed to have been violated, I have supposed the three States made a *compact*, subject only to the consent of congress. But in fact they made none, and were not authorized to make any, nor did their convention propose any, but only an arrangement with the general government, as appears by the second resolve proposed by the convention, and adopted, in these words, to wit, 'Resolved, that it be, and hereby is, recommended to the said legislatures, to authorize an immediate and earnest application to be made to the government of the United States, requesting their consent to some arrangement, whereby said States may *separately* or *in consent*, be empowered to assume upon themselves the defence of their territory against the enemy; and a reasonable portion of the taxes collected within said States, may be paid into the *respective* treasuries thereof and appropriated to the payment of the balance due said States, and to the future defence of the same, the amount so paid into the said treasuries to be credited, and the disbursements made as aforesaid to be charged to the United States.' On the whole, it appears it was intended the States should act *separately*, as the treasury in each case was to receive and charge *separately*. The other resolves proposed, which respected the militia, conscription, and

amendments, required no compact. There was a mission accordingly.

As to the *ulterior* measures, in the event the government of the Union would not consent to any arrangement, the convention said 'it would be inexpedient for this convention to diminish the hope of a successful issue to such an application, by recommending, upon supposition of a contrary event, ulterior proceedings. Nor is it indeed within their province. In a state of things so solemn and trying as may then arise, the legislatures of the States, or conventions of the whole people, or delegates appointed by them, for the express purpose of *another* convention, must act as such urgent circumstances may then require.' It will be observed the said act of congress fully complied with the wishes of the said States and their convention; and that the convention expressly declared that *ulterior proceedings were not within its province*, if congress should refuse to consent to any arrangement. Thus there were no grounds for saying these States, or their convention, made a *compact* in violation of the said tenth section, for they made no compact, and if their doings could be tortured into one, it was clearly intended to *be with the consent of congress*. But none was made, authorized, or intended.

It will be asked by some, why have these State proceedings been so much condemned? They never have been by the opposers of the then federal administration. They have been censured or condemned by its supporters only for these reasons, 1. The convention, in pointed language, condemned or censured the administration. It stated, in strong terms, the very great prosperity the constitution produced as administered twelve years by Washington and Adams, and their federal supporters; and asserted that 'this high state of public happiness had undergone a miserable and afflicting reverse through the prevalence of a weak and profligate policy;' that 'it was indeed to be hoped, that the rulers of these States would not make such disastrous haste to involve their infancy in the embarrassments of old and rotten institutions; yet all this they have done, and their conduct calls loudly for their dismission and disgrace.' The supporters of the administration uttered language as severe against their opponents. Party condemnation was then, and for some years before and after, the order of the day.

2. Jealous party men then (as at other times) never ceased to impute secret and bad designs to their opposers, however honest, and having no such designs.

3. Future history only can truly explain the motives and objects of that convention. It had to steer its course between

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Scylly and Charybdis. It was imperiously required, on the one hand, to promote the objects of its constituents and to express their excited and angry feelings and increasing discontent towards the administration of federal affairs; and, on the other, to moderate and allay those very feelings and that same discontent then increasing to dangerous extremes.

When multitudes are very much excited and highly dissatisfied with their rulers' conduct, often they can be moderated by their friends only when they know not their friends check them.

Finally, on the fullest examination, it will be found that the conduct of the eastern States, in the late war, affords no countenance, no defence, to any compact among two or more States, without the consent of congress, or with that consent, as they did not propose any compact. Much less is this conduct any defence or countenance to the recent southern constructions of the federal constitution above stated. It is to attract legal and constitutional attention to those momentous subjects, to the late novel construction, that this brief examination of, and concise comments on, them are here made. They are matters that affect our whole system in its vital parts, about which so much has been, and probably will be, written and said, and so little understood.

One thing is certain, that is, if any men in the United States have a deeper interest, than others, in the preservation of the Union, they are the merchants and manufacturers; men of property and creditors, public and private, in the eastern, and slave holders in the southern States, and therefore ought to be the most cautious that they do nothing tending to dissolve or impair this constitution or Union.

Note.—It will be observed that I have not considered the militia questions, as to which the president and the governor and judges of Massachusetts had different opinions. On attending to them, especially as to the officers and command, it appeared to me that any course short of a *full* examination would answer no purpose, of so difficult and doubtful a character were these questions. And this *abridgment* is not the place for such examination; therefore they are left for the present, where best seen in 8 Mass. Reports, pages 549 to 554, and in other public records of the year 1812, &c. and in the last resort to be settled by the supreme court of the United States.

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State statutes unconstitutional, being repugnant to the constitution of the U. States or not.

§ 1. Statute of Maryland as to imports, required all import-

ers of foreign goods by the bale or package, &c. and other persons selling the same by wholesale, bale or package, &c. to take out a license for which to pay $50, and in case of neglect or refusal, to take out such license, subjecting them to certain forfeiture and penalties, is repugnant to that provision of the constitution of the U. States, which declares that 'no State shall, without the consent of congress, lay any impost or duty on imports or exports except' (as to inspection laws,) and to that which declares that congress shall have power 'to regulate commerce with foreign nations, among the several States, and with the Indian tribes;' was error to the court of appeals of Maryland. Maryland act was passed in 1821, in addition to one enacted in 1819.

12 Wheat. 419–460, Brown and others, plts. in error, v. the State of Maryland.

§ 2. Similar cases—Saunders *v.* Ogden, ch. 1, a. 2, s. 5. Impairing contracts; a. 54; ch. 39, a. 9, s. 8, and Ogden *v.* Saunders; McMillan *v.* McNeil, ch. 39, a. 9, s. 9, same; Mc Culloch *v.* State of Maryland, ch. 143, a. 3, s. 3, same; Dartmouth College *v.* Woodward; ch. 143, a. 3, s. 4; Cohens *v.* State of Virginia, ch. 187, a. 7, s. 26; Osborn & al. *v.* United States Bank, ch. 143, a. 3, s. 9; U. States Bank *v.* Planter's Bank of Geo. ch. 143, a. 3, s. 9; Gibbons *v.* Ogden, a. 7, s. 52, this chapter; Society (Foreign,) for Propagating the Gospel, &c. *v.* the Town of New Haven, in Vermont, this chapter, a. 7, s. 49; Mason *v.* Harte, a. 7, s. 50, this chapter; Green & al. *v.* Biddle, a. 20, s. 2, do.; Fletcher *v.* Peck, ch. 196, a. 8, s. 22; Houston *v.* Moore, ch. 187, a. 7, s. 18; New Jersey *v.* Wilson, ch. 196, a. 9, s. 1, 2; Williams *v.* Norris, &c. ch. 187, a. 7, s. 44.

§ 3. In said case of Brown *v.* Maryland, the court considered the cause depended 'entirely on the question, whether the legislature of a State can, constitutionally, require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package, so imported'? As to articles *imported* 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on import to escape the prohibition in the constitution.' 'There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country.' 'No goods would be imported if none could be sold.' 'The same power which imposes a light duty, may impose a very heavy one, one which amounts to a prohibition.' Such a power would enable the importing States to tax the non importing, as consumers, very unjustly. Thompson, justice, dissented, pp. 449–460; noticed the indictment charged the defts. did *import* and *sell*, without a license, thought it had been good if it only had charged *selling*. That the article ceased to be an *import*

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as soon as landed, &c.: that as there is no objection as to *retail* dealers, there ought to be none as to *wholesale* dealers, &c.; that the law could not affect commerce among the States, &c.; that the *selling* was confined to Maryland, so completely *internal* in the State; that the idea paying the duties purchased a right to sell freely, was ill founded, &c.

§ 4. New York statute prescribing to the council to do what the constitution empowered it to do, adjudged void. People *v.* Foot, 19 Johns. R. 58.

§ 5. A State statute is void, which takes private property for public use, without providing for the owner, and just compensation is unconstitutional, also, against the fundamental principle of government, and a violation of natural right and justice. Same case in error, 735.

Bradshaw *v.* Rogers, 20 Johns. R. 103.

§ 6. *Kentucky* act that forbids persons to wear concealed arms violates the section of the constitution, which provides that 'the rights of the citizens to bear arms shall not be questioned,' and so void. Bliss *v.* Commonwealth, 2 Litt. 90. So the act is void subjecting free persons of colour to corporal punishment for 'lifting their hands in opposition' to a white person. Ely *v.* Thompson, 3 Marsh. 73. Held, acts of *limitations* are constitutional. 1 Litt. 330–335. There have been many other decisions made in Kentucky, declaring statutes of that State constitutional or not. 1 Litt. 17, 19, 265, 367; 3 do. 194–199; 3 Marsh. 73, 75, 349, 423, 515; 1 Marsh. 441–290; 2 Man. 75; 4 Bibb. 61, 416, 561.

Williams *v.* the Register, Cooke, 212.

§ 7. *Tennessee.* Where the rights of two individuals are in judicial conflict, any act of the legislature concerning them which may affect the obligation of their contracts, is void.

Cooke, 130.

Held, the occupant law, as far as it prefers the citizens of Tennessee to those of other States claiming under N. Carolina, violates the compact between N. Carolina and Tennessee, and so is void.

George *v.* Gamble 2 Tenn. R. 17, the State has a right to legislate respecting land within the Indian boundary, providing the statute shall take effect when the Indian title or right shall be extinguished. Several other such statutes have been enacted in Tennessee, as Cooke, 149; 1 Tenn. R. 243; 2 do. 215–341; 5 Hayw. 97, 246, 263.

1 Cowen, 550–571.

§ 8. The law courts will not declare acts of the legislature unconstitutional, except where clearly so.

6 Cowen, 642–652, the People *v.* Garey.

§ 9. The legislature has no power to shorten the constitutional term of a justice of the peace. This cannot be done indirectly by the creation or division of counties.

CHAPTER CLXXXVIII.

APPEALS.

§ 3. An appeal lies, in all criminal prosecutions, from the sentence of a justice of the peace, who tries without a jury, to the common pleas, where a jury trial may be had by the necessary construction of the constitution of Maine, a. 1, s. 6. 1 Greenl. 280.

§ 4. No appeal lies to the supreme judicial court on the stat. 1817, ch. 185, s. 5, in cases where the error complained of appears of record as in a judgment rendered upon demurrer; was *scire facias* against bail first brought before a justice of the peace. 1 Greenl. 291-292.

§ 5. It is a general principle that a court of *appellate* jurisdiction will not consider and decide on any question in a cause, that has not been considered and decided on in the court below. Though the rule is, if an objection be not taken in the court below, it cannot be taken in the appellate court, yet this rule applies only to objections the party by silence is deemed to have waived, and to objections that, when waived, leave the judgment resting on the *merits* of the cause. Henry v. Cuyler, 17 Johns. R. 469. 16 Johns. R. 384.

§ 6. Held, 1. A person having no interest in the subject matter of a suit, cannot be a party in any court: 2. If he have an interest at the commencement of the suit, and that interest ceases, the right to prosecute the suit, or to appeal, also, ceases. Reid v. Vanderheyden, 5 Cowen, 719-742.

§ 9 *con.* This case is revised and confirmed. The supreme court of the United States confined to the examination of the plt's. title, as depending upon the construction of an act of congress. It cannot take into consideration any distinct equity arising out of the contracts and transactions of the parties, and creating a new and independent title. This was an appeal from a State court on the twenty-fifth section of the judiciary act of congress of September 24, 1789, ch. 20, on an alleged misconstruction of an act of congress, by a State court. ART. 2. *Con.* 7 Wheat. 164-212.

On a libel *in personam* for damages, if the court decree that damages be recovered and that commissioners be appointed to ascertain the amount thereof, no *appeal* lies from such a decree until they have reported; this not being a *final decree*. Chase, &c. appellants *v.* Vasquez, the Consul General of Portugal, respond. 11 Wheat. 429-430.

§ 22 *con. An appeal that prevents execution issuing, &c.* A, told the clerk that if certain items of costs taxed by B, should be allowed, he should appeal; and while the execution was remaining in the clerk's hands, A reminded him of the appeal claimed. Held, this was a sufficient entry of an appeal, B having obtained such execution by mistake, and after notice

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of the appeal, having caused A to be arrested, he settled the execution, this execution was void, and B was liable to A in trespass, for the amount he paid, with interest, from the time of payment. The court had B's action brought forward on the docket, in order the judgments in the two actions might be set-off. 1 Pick. R. 211–215.

§ 23. No appeal lies to the common pleas on an issue in law in a *personal* action commenced before a justice of the peace. 5 Pick. 278, Belcher *v.* Ward.

Art. 5. *Con.*

Jaques *v.* Methodist Episcopal Church, on Appeal, 17 Johns. R. 548. 1 Johns. Ch. R. 77; 3 do. 66. Wood *v.* Dwight, 7 Johns. Ch. R. 295.

§ 8. An appeal from a *final* decree in a cause, opens to the court of errors, all prior orders or decrees any way connected with the merits of the *final* decree. An appeal to the court of errors, stays, in the first instance, all proceedings in chancery, on the matter appealed from. But after an order dissolving an injunction, staying an execution at law, the plt. may proceed at law with his execution, though there is an appeal from the order, as this does not affect the validity of an order dissolving an injunction, or discharging a party from a writ of *ne exeat*, or revive a process.

§ 9. A cause cannot be entered in the court of errors till after the petition of appeal addressed to that court, and the answer of the deft. to such appeal has been filed in that court. Woodcock *v.* Bennet, 20 Johns. R. 501; Murray *v.* Coster, do. 603.

§ 10. If pending the appeal to the court of errors any of the parties change, by death, &c., the cause is remanded, in order to have the proper new parties. 9 Johns. R. 442; as to costs, 20 Johns. R. 499.

§ 11. An appeal does not lie to the supreme court from the judgment of a superior court granting a new trial in matter of law. State *v.* Robison, 1 Hawks, 188; nor from a judgment of *respondeas ouster* given on demurrer to a plea in abatement, 189.

4 Cowen, 505–507, Van Hoesen's Case.

§ 12. A motion for a *mandamus* to the common pleas of——. Held, on appeal from a justice's court, the bond required by the statute, may be executed by attorney.

§ 13. Appeal lies from a circuit judge either granting or refusing a certificate of probable cause, but the court will not hear an argument on it. The court looks into the cause merely to see whether there be probable cause to stay the proceedings. Lyon *v.* Burtis, 4 Cowen, 539; 140–141.

§ 14. Under the act sess. 47, ch. 238, s. 36, 38, an appeal lies in all cases, whether the judgment of the justice be on an issue of law or fact. Harwood's Case, 5 Cowen, 19.

Act A. D. 1824. Actions. Peters *v.* Parsons, 18 Johns. 140, and Breese *v.* Williams, 20 id. 280, were on the act of

1818, sess. 4 1,ch. 94, s. 17, 18, 19. Alternative *mandamus* issued to the common pleas, s. 14. The appellee in the common pleas, cannot object that the appeal bond is in the penalty of more than double the judgment before the justice; though being less would be an objection; such *mandamus* awarded. Jurisdiction in the common pleas, for the purposes in cases of appeal, though the appeal bond be defective. May be executed by sureties. A general power to defend a cause will not authorize the attorney to execute an appeal bond in the name of his client.

5 Cowen, 27. 5 Cowen, 33. p. 34–35. p. 35–63.

§ 3 *con.* Where an appeal is allowed by the court of chancery, and an indefinite time given for executing the appeal bond, the appeal is irregular. 2 Rand. 5.

ART. 6. *Con.*

An appeal lies from the chancellor's order overruling a motion to dissolve an injunction, where so, on the ground the plt. in equity is entitled to relief on the merits, and fixing the principle on which the cause depends, or where it is necessary to avoid expense and delay: 2. On an appeal from an order refusing to dissolve an injunction, the court will notice any error in the previous proceedings: 3. It is error in the chancellor to grant an injunction without requiring security, except in the cases of executors, administrators, and other fiduciary characters. 2 Rand. 247–275, Lomax *v.* Piot.

When a judgment has been rendered in a court of law, and the record omits to state an appeal was allowed, no evidence can be received at a subsequent term, that the appeal had been, in fact, allowed, but that the clerk had neglected to enter it in his record: 2. The filing an appeal bond with the clerk, must be in pursuance of an allowance of the appeal, entered on the record. 3 Rand. 104–106.

An appeal cannot be taken from a chancery court, on the ground the appellant has been improperly decreed to pay costs. 3 Rand. 165–167.

The court of appeals has no jurisdiction in cases of informations in *penal* cases. 4 Rand. 148–151.

§ 4 *con.* Action in the county court for above $100 on a *single bill.* If the jury find for the plt. less than $100; judgment reversed by the deft. on a writ of *supersedeas*, the plt. cannot appeal to the court of appeals from such judgment of reversal. To give this court jurisdiction on the ground the matter in controversy is a freehold or a franchise, the right to the freehold or franchise, must be *directly* the subject of the action, and not *incidentally* or *collaterally.* 5 Munf. 276.

Lewis *v.* Long, 3 Munf. 136, and p. 202.

An appeal taken in the name of a party, without his knowledge or consent, may be dismissed, as to him, on motion.

4 Rand. 611.

When in consequence of a decision of this court, on an appeal from a circuit court, further proceedings become neces-

Vol. VI. Ch. 188. *Art.* 6. *Con.*

sary, the cause will be remanded, whether the appeal is from an interlocutory or a final decree. The bill was to foreclose a mortgage and for sale, and the defence usury, stated in the answer. 1 Hop. Ch. R. 508–512.

1 Hop. Ch. R. 552—554.

Appeal. Decree of the surrogate reversed by the chancellor for particular reasons, and a just cause of action appeared. He retains the cause and proceeds, as may be proper, to attain the justice of the case. The appeal, originally, was to the court of probate, before it was abolished by statute of March 21, 1825, and thereby was transferred to the court of chancery.

No appeal on a judgment for costs alone. 1 Littell, 363.

CHAPTER CLXXXIX.

REVIEWS.

Art. 1. *Con.*

1 Greenl. 322–325, Morrill *v.* Kimball.

§ 17 *con. Review on account of perjury, &c.* As where the witness testifying for the prevailing party, was afterwards convicted of *perjury* in the cause, the court allowed a review on Mass. stat. 1791, ch. 17; Maine act, ch. 57, and this though the witness was summoned by the party not prevailing. The party prevailed principally by means of the perjury; parties cited many authorities, the court none. This review was at the discretion of the court, and in *good conscience.* Reviews in Maine as in Massachusetts, 'no longer existing as a matter of right.'

2 Greenl. 322. None in a criminal case under stat. 1821, ch. 57.

Art. 3. *Con.*

4 Pick. R. 129, Pope *v.* Pope.

§ 22 *con.* Held, the supreme judicial court in Massachusetts, has no power to grant a new trial, or a review of an issue arising on an appeal from a decree of the judge of probate, after a judgment has been entered on the appeal. The court observed, 'the reasons may be as strong for giving the court power to grant a review or a new trial upon petition in this case, as in any other, but the statute, from which our authority is derived, appears to relate to trials in civil actions only; we consider the question as settled by the case of Borden *v.* Bowen,' 7 Mass. R. 93; stat. 1791, ch. 17, s. 2; see stat. 1788, ch 11, s. 1; stat. 1786, ch. 65; stat. 1817, ch. 63, s. 2.

Art. 4. *Con.*

§ 2. Haskell, petitioner *v.* Buckett, for a review, &c. Held, the court, in exercising its discretion, will not grant a review on petition, where the object is merely to discredit a witness, who testified at the trial: 2. Nor because one of the jury was not impartial, or was hostile in his feelings to the petitioner, if this fact was known to him before the trial, if it appears he had formed no judgment of the merits, and stood indifferent between the parties. 3 Greenl. 92–94.

CHAPTER CXC.

SCIRE FACIAS.

§ 15 *con.* This writ need not state what goods, lands, &c. have been acquired by the deft. since the date of the judgment: 2. Not a good plea the deft. had conveyed, &c., to the sheriff, goods, lands, &c., according to the statute, to a great value, &c., and that no proceedings had been had on it, against said lands, &c.: 3. Nor is it a good plea the deft. had conveyed, &c., in like manner, various debts, &c., and that the proceedings prescribed by the act to recover such debts, had not been had. Lang, the debtor, had acquired property after he took the oath of insolvency, and been discharged: 4. The plt. cannot reply and demur to the same plea: but 5. Pleas being no bar to the action, judgment for the plt. affirmed. Lang, appellant *v.* Lewis, administrator. 1 Rand. 277—281.

§ 4 *con.* *Scire facias* was omitted, and a *levari facias* issued several years after the judgment. Held, it was not void, but only voidable by a party to the suit. 2 Serg. & R. 426. ART. 2. *Con.*

§ 28. If execution be delayed above a year and day, with deft's. consent, or by injunction from chancery obtained by him, no *scire facias* is necessary. U. States *v.* Standford, 19 Johns. R. 173.

§ 29. Where the judgment creditor proceeds to enforce his lien on real estate, and must revive his judgment, he must make all the *terre-tenants* parties to the *scire facias*, in order to compel them to contribute *jointly* to satisfy the debt. Morton's executors *v.* *terre-tenants* of Croghan, 20 Johns. R. 106. Properly parties only when the original deft. is dead. 11 do. 513.

§ 30. Where there is a change of parties by death, marriage, &c., so that other persons become interested in the execution of the judgment, a *scire facias* is necessary to make such new person a party to the judgment; as if a feme sole plt. get a judgment on a report of referees and marries, *scire facias* must issue to make the baron a party. Johnson *v.* Parmely, 17 Johns. R. 271.

§ 31. Where a judgment is above ten and not of twenty years' standing, the plt. may apply to the court for leave to issue a *scire facias*, supported by an affidavit, stating it is not satisfied: if above twenty years' standing, there must be, on motion, service of notice, &c., or a rule to show cause: when above twenty years, the court has a discretionary power to grant or refuse a *scire facias*. Bank of N. Y. *v.* Eden, 17 Johns. R. 165.

§ 32. To a *scire facias* on a judgment, it cannot be objected the judgment was founded on a *blank* declaration, not filled up until after judgment was entered. It is sufficient if the record be complete at the hearing of the *scire facias*. 2 M'Cord, 144.

Vol. VI. Ch. 190. *Art.* 4. *Con.*

§ 34. If a judgment creditor proceed to enforce his lien on real estate, and for that purpose the judgment must be revived, he must make all the terre-tenants parties to the *scire facias*, in order that they may be compelled to contribute, jointly, to the payment of the debt: 2. If some of them appear and plead, and others of them are defaulted, and as to those the plt. enters a *nolle prosequi*, and takes judgment by default against those defaulted, it is a discontinuance as to all the defts., and he must pay *costs* as in case of discontinuance: 3. *Aliter* in actions of tort, where the plt. may elect to sue jointly or several, or in *assumpsit*, or in *debt*, where one of the defts. pleads matter of personal discharge, which does not go to the action of the writ, as bankruptcy, infancy, &c.

Morton's executors v. terre-tenants of Croghan, 20 John. 106.

CHAPTER CXCI.

PARTITION.

Art. 1. *Con.*

§ 12. 1. The power of a court of equity to grant partition is not *discretionary*, but *ex debito justitiæ*: 2. Wherever a plt. has a right to partition at law, he has the same right in equity: 3. A purchases the interest of devisees, and brings his writ for partition, the conveyances to him are not to be impeached on the ground of fraud or mistake: 4. And they are valid though they state the testator's widow has a *life* estate when she has only an estate for *years*; and valid too for the whole amount of interest: 5. Nor is her dower barred by any devise of an estate *for years*, or of *personal* estate: 6. The devise was to the wife 'during her life, or until his youngest son comes of age.' She and the children believed she was entitled to a *life* estate, and so answered in chancery to Wiseley's bill, and the chancellor was of the same opinion. The devisees sold all their right, title, interest, and estate, for a valuable consideration. Held, she had but an estate *for years* under the will, and hence was entitled to dower at common law, and until this was assigned by statute, she held the whole estate rent free. Act of 1792, ch. 92. The court decreed dower and partition, and added, 'but this decree is not to prejudice any of the parties, in any suit they may be advised to bring against the said Wiseley, upon the ground of fraud or mistake, in relation to the terms of the conveyances made to him.'

3 Rand, 361—372, Wiseley v. Findley & al.

4 Rand, 74–94, the same principle.

§ 13. *Equity discretion in partition*—is of right if the plt's. title be clear or admitted; but if denied, or doubtful, or depends on questions of law, a court of equity will either dismiss the bill or retain it till the right is decided at law: 2. In questions *purely* equitable, twenty years adverse possession will bar

4 Rand, 493–498.

the plt's. remedy. But where the court is only called upon to grant partition under a legal title, which is disputed, it is proper to retain the bill till the right is so decided at law: 3. Equity has no power to decide questions involving legal title to lands, especially when it can be asserted without any impediment in a court of law. Cited 17 Ves. 552; 2 Ves. Jr. 570; 1 Ves. & Beam. 556; 2 Atk. 380; 3 Johns. Ch. Ca. 300; Phips *v.* Green.

It is a general rule that a court of equity will not allow a man to make a defence he can make at law, except he shows some special reason therefor. 4 Rand, 537-541.

§ 14. *Partition does not adjust dormant claims, &c.* Does not settle adverse titles, and real and pretended incumbrances held by third persons, none of which can be affected by the decree; nor do their interests prevent partition, nor are they affected by it. Judgment creditors are not necessary or proper parties to it. Partition among tenants in common is only of their rights, 17 Ves. 542, Agar *v.* Fairfax; Baring *v.* Nash, 1 Vesey & Beames, 550: may be by tenants for years, or one may hold in fee, one for life, and a third for years; one's part may be subject to a lien, and another's not; in case of a sale they divide the proceeds accordingly. 1 Hop. Ch. R. 505-508.

§ 8. *Partition in Maryland at common law, between tenants in common.* Held, 1. No possession of one can bar a writ of partition of the other, unless by *adverse* possession, long enough to take away his right of entry, that is, twenty years; or where there has been an *actual dispossession* and a subsequent possession by the disseisor, for five years, and his dying so possessed, and a descent to his heir: 2. If one has been solely possessed of the land, receiving the profits above twenty years, the other's right of entry is not gone, except *actually put out*, or his title to hold in common, *uniformly denied*: 3. So long as one is possessed of a *part*, he is of the whole; except *a part* be separated *by actual inclosures* by the other, who, also, *uniformly denied* the other's title to hold in common: 4. From no length of possession is a partition to be presumed, unless the possession was *exclusive* and *adverse*, and the other's title to hold in common, *uniformly denied* by him in possession: 5. If the plt. in a writ of partition show a title to hold in common, and a right of entry, he shall have partition against the deft. holding or claiming as tenant in common. ART. 2. Con. 2 Har. & Mc H. 254-260, Lloyd *v.* Gordon and wife.

§ 10 *con.* A probate court; decided the judge is not authorized to make partition of the share of one heir or devisee, leaving the others tenants in common. But on the application of one the judge may cause the whole land to be divided among all the heirs or devisees: 2. Where a devisee had conveyed a part of his share, prayed the residue might be assigned to him in severalty, and the judge not noticing the conveyance, decreed par- ART. 3. Con. 5 Pick. 210-212.

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tition be made among the devisees according to the will, the decree was not erroneous on that account. Stat. 1817, ch. 190, s. 24, is not imperative on the judge to make partition; hence he may in his discretion, decline to cause partition to be made.

17 Mass. R. 345–347.

§ 10 *con.* If an heir convey his share in the estate of his ancestor to a stranger, pending a probate commission for partition, it did not avoid the commission before the stat. 1817, ch. 190, otherwise if before the probate proceedings be instituted. See Pond *v.* Pond, a. 6, s. 15; a. 3, s. 10.

§ 11 *con.* So the partition is void where the judge of probate assigns all the real estate to the eldest son, on condition he pay the other heirs the value of their shares in money, *in three* years, *but takes no security*; and may be avoided on a writ of entry. Stat. 1783, ch. 36, s. 5, requires security. (Stat. March 9, 1784.)

Nor can the judge proceed to make partition, pending a petition therefor, instituted by the heirs or some of them, and the widow's action for dower in the courts of common law, and therein *first* commenced.

16 Mass. R. 167–172.

1 Pick. R. 150 —152.

If one tenant in common agree in writing *not sealed*, not to claim partition during A's life, yet she may have partition whatever remedy there may be on the writing. It cannot affect real estate. Perhaps otherwise in a court of equity.

1 Greenl. 269–276, Southgate *v.* Burnham.

§ 13. Under the partition statute in no *adversary* form, the appointment of commissioners by the court to make partition, is substantially to enter judgment *quod partitio fiat*, and their report accepted and recorded, may be as the final judgment, the entries in the decree, even if inconsistent with the judgment, yet are inadmissible for the purpose of impeaching it. See stat. 1783, ch. 41, s. 1.

4 Pick. 246–248.

§ 14. In partition by petition, it appears the parties are tenants in common of *part* of the land only, and not interested in the residue, and partition is only of the part, the respondent has costs.

§ 15. The owners of an equity of redemption may have partition of their interest, *as between themselves*. But mortgage and judgment creditors are not compellable to join in a bill for partition, nor can relief be prayed against them, nor can their rights be affected by the partition.

Wollen *v.* Copeland, 7 Johns. Ch. R. 140.

§ 16. Chancery by statute in N. York, is empowered, as law courts are to decree a sale where justice requires it. On a bill for partition, chancery may decide on the necessity of a sale, on the master's report, or the commissioners; and when he reports a sale is necessary, commissioners are appointed to sell and convey.

Thompson *v.* Hardman, 6 Johns. Ch. R. 486.

§ 17. A died seised of the farm, and left nine children, and heirs, tenants in common. In May, 1803, deft. acquired two

shares, and claimed the whole in fee under a contract. Three of the heirs in petition under the act for partition of lands, passed April 12, 1813, claimed partition for three ninths, and to be seised in fee as tenants common, each one ninth. Petition was presented to the court Aug. 9, 1823; served on the deft. Plea that at the time of preferring the petition, and at the time of pleading, he was sole seised, and possessed in his demesne as of fee, &c. and traversed the tenancy in common. This plea was annexed to a notice that he had been so seised for twenty-five years previous to the exhibition of the petition, adversely to the claim of the petitioners, and all other persons. Replication the plts. were seised in fee, &c. as tenants in common *modo et forma*, &c. and issue. Oct. 1802, one of the heirs having bought the share of another, contracted with the deft. to convey to him the whole farm in fee, and, May 3, 1803, so conveyed. Deft. entered March, 1803, and continued in possession ever after claiming title in fee. One of the plts. was covert in 1803, but her husband died thirteen years before the suit was commenced. Defence set up was *adverse* possession twentyfive, at any rate above twenty years. Held, 1. The object of the suit was under said act to ascertain the several rights of the parties; but possession is not awarded: 2. Though the plt's. right of possession was destroyed by *adverse* possession when this suit was commenced, yet when the court saw that such possession was short of twentyfive years, and so no bar to a writ of right; the court was bound to proceed under the statute, and ascertain the rights of the parties: 3. To warrant proceedings in partition, it is not necessary all the parties should be actually seised when the suit is commenced. The plts. said the deft's. possession was not adverse *in its inception*. *Quere* as he took possession in March, 1803, under the contract of October, 1802. At any rate his possession became *adverse*. May 3, 1803, under the conveyance according to the case of Jackson *v.* Johnson, &c. ch. 74, a. 10, s. 3, above twenty years before the suit was commenced, so the right of entry and of possession was gone, hence the case proceeded wholly on the right of *propriety*, because the plts. were entitled to their writ of right, and not barred by the act of limitations. It seems twentyfive years *adverse* possession is a bar to all remedy in New York; and, therefore, those who can have a writ of right, can petition for partition. See art. 1, s. 6, Wells *v.* Prince; and art. 4, s. 6, Bonner's case; also Cook *v.* Allen, above.

Bromagham & others, *v.* Clapp, 5 Cowen, 295—298.

CHAPTER CXCII.

TRUSTEE ACTIONS.

1 Greenl. 328–329.

§ 3 *con.* Neither in Maine or Massachusetts does any act apply to this continuance but this trustee. Act 1794, ch, 65; Maine, ch. 61, s. 2. The acts require two continuances; whenever a case comes within a particular act that governs not the *general* statute.

1 Pick. R. 32.

The trustee has costs if the action be dismissed for want of a declaration; and, page 164, summoned in his county, and neglects to appear on the original process, and on the *scire facias* is adjudged trustee, he is liable for the costs on the *scire facias*.

ART. 3. *Con.*

§ 3 *con.* Trustees, who constituted a mercantile firm, doing business in North Carolina, where three of them had their domicil, and the other two in this State. The process was on them only (in Boston.) Held, this was sufficient to hold the funds in the hands of the company, belonging to an absconding debtor. All five partners were named in the writ. Process may be stayed till facts are fully known.

16 Mass. R. 290–306, Parker & al. v. Danforth & al.

16 Mass. R. 318–326.

The trustee process may hold, though the goods may possibly be attached, and if A summon B, as trustee, then C attaches the goods, the officer holds them subject to A's lien.

16 Mass. R. 473–479, Hathaway v. Russell.

§ 12. The original was against two London merchants; Russell and four others, trustees. Judgment against the principal. Trustees did not appear. Plt. sued this and four other writs of *scire facias* against the supposed trustees severally. They appeared and disclosed. Held, where only a part of joint contractors, with the principal defts., are summoned as trustees, those summoned will be allowed the benefit of such setoffs as their copartners, not summoned, are entitled to against the principal: 2. If such joint contractors do not expose the effects in their hands, on the execution issued on the first judgment, they must be joined in the *scire facias*. There were six owners, five only were summoned as trustees. No plea in abatement.

4 Pick. 57, 58, Dickerson v. Strong, Leland, Jr. & al. trustees.

§ 13. Before Leland was summoned he signed, as surety, a promissory note for $2031, given by Strong to E. Kimball, as the consideration for lands, and had received, as his own security, from Strong, sundry promissory notes given to G. Cutler and L. Boltwood, and by them endorsed, and also a promissory note given to Cutler and Strong's wife, payable to bearer, out of the proceeds of which it was expected the note to Kimball would be paid; and Leland took from K. a deed of the land, giving to S. a bond, that, on being exonerated from his liability to K., he would reconvey the land to C, in trust, for S's.

wife and children; that all the notes assigned, but one, were collected, and the monies paid to K. before the writ was served, and the one was paid after. Held, L. was not trustee on either score.

§ 3 *con. The trustee, a cashier of a bank, where liable.* B, indebted to the bank, made a deposit, also transferred certain shares, to *the cashier*, in the stock of the bank, and of an insurance company, without condition. But the cashier and B both understood the shares should be held as collateral security for B's debt, and that the surplus be paid to him. Held, for this the cashier (Geo. Burroughs) was trustee, the transfer being valid, and so that he could hold the surplus; but he could not have been trustee if the transfer had been made to the corporation, nor can that be a trustee. Was made to him for the benefit of the bank. He had the control of the shares to sell them, and the word *cashier* was a mere personal designation. Not trustee for the deposit. Continued to give him time to sell the shares, pay the bank, and find the amount of the surplus.

16 Mass. R. 275–280.

A man may be trustee for having in possession a specific article of another's, or for owing him a sum of money. A judgment, one is trustee, is conclusive, if not appealed from.

1 Pick. R. 459–461.

A is trustee, if he have property of his principal in his hands, though he give him a check for the amount, if the check be not paid and A has the control of it.

2 Pick. R. 204–206.

§ 7 *con.* If the surety pay the bond to the United States, and sue the principal in Cuba, and recover, &c. and then the principal pays the United States, the surety is a trustee for what he recovered of the principal in Cuba, by coercion, &c.

2 Pick. R. 89–102, Watkins v. Otis & tr.

§ 14. What do the trustees of a partner hold? Only the interest of the absconding debtor, and therefore where he is one of a partnership, they are entitled only to his share of the *surplus* of the partnership property remaining after the payment of the partnership debts. Lies not against a corporation. If A and B be tenants in common, and A is such debtor, the officer may seize his moiety, though in B's possession, and sell it, and that only, and the purchaser becomes tenant in common with B.

16 Johns. R. 102.

id. 5.

15 Johns. R. 179.

id.

§ 15. Held where, without the owner's authority, goods were delivered by his wife to an agent of one of his creditors, in pledge for his debt, and were removed by the agent to his own house, they might be attached under this process, it not being necessary to sustain it, that the goods should be in the hands of the trustee by virtue of a contract with the debtor: 2. If such agent had a lien, he was yet liable to this process; and where, after being summoned, he caused the goods to be

5 Pick. 178–181, Swett & al. v. Brown & trustee.

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attached and taken out of his hands in a writ in favor of the creditor, his principal, the lien was dissolved, and the plt. in this process acquired a priority over the other creditors. Brown was the debtor and absconded. Parsons was his creditor and attached in this process. To his agent Brown's wife delivered the goods as a pledge for Parsons, but found no pledge, as the wife had no power, &c.

ART. 5 *Con.*

§ 3. Money was paid to A and B, for them to apply, *at their discretion*, to support a son of the donor, and if he

16 Mass. R. 62, 63.

should not live to expend it in his necessary support, then to be paid to the donor's other children and grandchildren. Held, A and B were not trustees to the son's creditors. A and B were not executors or administrators; nor were they indebted to the son, the principal deft., nor could he sue them for the money; it was at their discretion. Like case, p. 522.

16 Mass. R. 341-344.

A man is not trustee where he is not the absolute debtor, or has not the effects in his hands of the principal.

1 Pick. R. 461, 462.

A is summoned as trustee to B. A discloses B's order to pay over the money to C. A is not trustee, though the order be not for *value received*. The words *value received* are not necessary.

2 Pick. R. 399–404, Gardner v. Howland & trus.

A may recognise by his attorney to prosecute the appeal, &c. on statute 1820, c. 79, s. 4. Principal sold his property, while at sea, and before the master (trustee) was summoned.

2 Pick. R. 617, Donnels v. Edwards & trus. 3 Pick. R. 1-4, Harris, Jr. v. Aikin & al. & tr.

A owes B $2000 and C $1600: conveys to them a vessel in common form, worth $3600. Neither is trustee, for they take the vessel, not in moieties, but in proportion to their separate debts. Trustee could ascertain if he owed the principal on a building covenant.

3 Pick. R. 65.

Not a trustee if the fund be contingent, as a debt to be received, &c.

3 Pick. R. 201.

A employs a minor son and his father does not object, he is not entitled to the pay, hence A is not his trustee, if there be no intention to defraud his creditors.

3 Pick. 302.

One not a resident in, or an inhabitant of Massachusetts, but comes into the State occasionally, in the day time, is not liable to the trustee process. Ray & al. v. Underword, trus. 10 Mass. R. 343; 16 do. 299.

2 N. H. Rep. 374, Adams v. Barrett trus. of Dakin.

One cannot be charged as trustee of another, unless holding goods of his, either liable to an attachment, or the detention of which has subjected the trustee to an action in behalf of the principal, or unless owing some debt to the principal. An administrator, in his own right owes to the creditor immediately his dividend decreed by the judge of probate in the case of an insolvent estate.

§ 25. Decided the assignee of goods pledged is not trus-

5 Pick. 28-33, Andrews v. Ludlow, Chapman & al. trus.

tee of the assignor served while the lien continues: 2. The assignee of a contract to deliver goods to the assignor is not trustee, the contract being a mere chose in action.

In this case, Ludlow the insolvent, June 18, 1822, assigned in trust to C, &c. his property, real, personal, and credits by indenture of three parts to sell, collect, &c. and after deducting expenses, and $1000 for the services of the trustees; they to apply the proceeds, 1. To pay Ludlow's debts to the United States, about $3000: 2. To pay *pro rata* debts due to the trustees and other creditors of the third part, but on condition that those creditors only should be entitled to dividends who signed in two months, &c. September 6, agreed who signed in thirty days from that time. The creditors who signed released their debts. There was a question of fraud on this clause in the indenture, to wit, 'to pay the surplus, if any, to the said Ludlow, and in like manner to pay over any dividend which would have become payable to any creditor, if he had not neglected to become a party within two months after the making of the said assignment.' The trustees further stated the indenture was executed by them, Ludlow and one Thayer before the service of the plt's. trustee process, which was July 3, 1822. Their debt $4453; Thayer's $2511; to creditors, who signed afterwards, above $10,000. Part of the property assigned was at sea, and pledged to T. K. Jones & Co. from whom the assignees (trustees) *afterwards* received a balance of $5,919. Other property abroad, &c. A contract in which one Whiting engaged to deliver Ludlow three hundred barrels of beef, not delivered July 3, 1822. Other sums received, &c. Cited for the plt. 2 John. Ch. R. 565; 14 Johns. R. 458; 2 Pick. 129; 5 Mass. R. 144. Cited for the trustees, 7 Mass. R. 438; 3 Mass. R. 70; 4 Mass. 235; 11 do. 493; 16 do. 343; 9 do. 537; 17 do. 557. Held, 1. Not trustees as to the property at sea, or the beef; for a trustee is not chargeable for personal property of his principal 'of which he has only the constructive possession; but it must be in his actual possession, or within his control, so that he may be able to turn it out to be disposed of on execution:' 2. No fraud: *quære.* The court *presumed* said cited clause was inserted to hasten the creditors, so as to have a speedy settlement. So not like Harris & al. *v.* Sumner, 2 Pick. 129, in which a provision was secured to the debtor unconditionally. The court said 'we cannot infer it was the intention of the parties to make provision for the benefit of the debtor; *for it could not be presumed* that the creditors would refuse to accede to an arrangement evidently made for their benefit, and there could have been no expec-

VOL. VI. CH. 192. *Art.* 5. *Con.*

tation of a surplus.' Noticed the act of September 6. The error in this case, if any, appears to be in the court's *presuming*, especially that the creditors would not refuse to accede, &c. The creditor might have many reasons for not releasing his whole debt, and for not trusting to a small dividend, or none at all. In Widgery *v.* Haskell the court admitted no such presumption, but excluded it. It is conceived the insolvent cannot reserve any kind of benefit to himself, conditional or unconditional, to the disadvantage of any creditor without his consent.

5 Mass. R. 153.

ART. 6. *Con.*

§ 17. *Trustee's disclosure how evidence.* Is on an issue to the jury to try the validity of an assignment, where the assignee becomes a party to the record on the Maine statute, ch. 61, s. 7. The trustee, in his answer, disclosed an assignment to Arthur Gilman, who so appeared, and was admitted pursuant to Massachusetts statute 1817, ch. 148, Maine act as above: an issue was formed: Ch. 192, a. 6, con. s. 14.

1 Greenl. 328.

§ 18. The death of the debtor, and the issuing a commission of insolvency on his estate, dissolves the attachment.

1 Greenl. 333.

5 Pick. 448, Devall *v.* Brownell.

§ 19. One summoned as trustee in this process, is not exempted from answering questions, because, thereby may charge himself as a party to a fraudulent sale. The court said, 'the constitutional provision that no subject shall be compelled to furnish evidence against himself, does not relate to questions of property.' See ch. 80, a. 1. s. 48,

5 Pick. 480—482, Williams *v.* Reed and Pratt his trustee.

§ 20. Pratt, as guardian, sold lands to Reed, and received part pay, but did not take the oath, or give bond, so the sale was void: his deed to Reed was delivered to one Pool as an escrow, and never received by Reed: held, Reed had a right of action against Pratt to recover back the part of the consideration paid; so Pratt was trustee to Reed.

ART. 8. *Con.*

§ 2 *con.* This foreign attachment does not lie where the plt's. demand is founded in tort: 2. An affidavit by the plt., not swearing positively to a contract, is not sufficient. Jacoby *v.* Gogell, 5 Serg. & R. 450.

§ 10 *con.* South Carolina has trustee or attachment acts of 1785 and 1799, domestic and foreign: by that of 1799, the writ of attachment is demandable on common right; but not issuable till the plt. gives bond to the deft., for double the amount for which the attachment is issued, to answer all damages the deft. may sustain. Tne garnishee has the same right to defend against the plt., as he would have against the absent debtor if he were present, and suing to recover the supposed debt from the garnishee. This attachment, it seems, can issue only when the debtor is out of the State. The court, at discretion, may receive the garnishee's return the second term. The attachment creates a lien, which nothing subsequent can

2 Nott & Mc Cord, 125–127. Boyd *v.* Boyd. 1 Const. R. 456. 2 Nott & Mc Cord, 323; 1 Mc Cord, 331. 1 Nott & Mc Cord, 189–191, 2 do. 488.

destroy: 1 Mc Cord, 480: not necessary to proceed against the garnishee, who makes default, till judgment is had against the absent debtor, on motion; even without notice, judgment may be against the garnishee. 1 Mc Cord, 403.

As to the domestic attachment the magistrate can issue, it is only when the debtor is removing out of the county privately; where he is about to remove his effects, and where he so absconds and conceals himself, that the ordinary process of law cannot be served on him. 1 Bay, 361; 1 Nott & Mc Cord, 205–207; Mc Kinnie *v.* Buck; and, 1 Mc Cord, 511.

§ 14. Trustee suit in Maryland: see ch. 18. a. 2, s. 16; and by act of congress of April 20, 1818, s. 8; the United States suing a corporation on bill, note, or other security, may summon as garnishees, the debtors of it, and they must appear in open court, and depose in writing, to the amount he or she was indebted to the corporation when summoned, and when he or she makes or made the deposition, and judgment may be in favor of the United States, for the sum admitted, by such garnishees, to be due to the said corporation; but not till there is judgment first against the corporation sued; nor until the sum in which the said garnishee may stand indebted, be actually due: section 9: If he or she depose in open court, that he or she is not indebted to such corporation, nor was, when summoned, the United States may tender issue upon such demand, and if the verdict be against the garnishee, judgment on the verdict, and for costs of suit.

§ 3 *con.* 16 Mass. R. 129. It is a settled rule in pleading, that what comes under a *videlicet*, is no averment. But material matter, though alleged under a *videlicet*, is traversable, and must be proved as alleged.

ART. 9. *Con.* 1 Mason, 57.

§ 15. Trustee suits in Kentucky. On execution, the insolvent debtor renders a schedule that came into the clerk's office with the execution, from which office it issued: the summons on such schedule, is issuable in the name of the sheriff of the county in which the garnishee resides. The summons requiring the garnishees to appear, on a certain day, before the court, and make oath, and say, whether they, or either of them, was indebted, as the schedule alleged, is sufficiently certain. When the garnishee states, that he owes to the deft., in the execution, a debt payable at a future day, judgment is given for the debt, with stay of execution, till payable. It seems, the plt. must first get judgment and execution against his debtor, and have a return, with a schedule of his property in the garnishee's hands, and he is questioned on this schedule.

1 Litt. 127—130, Sheriff, &c., *v.* Buckner.

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Con.

CHAPTER CXCIII.

SYNOPSIS OF PLEADINGS.

§ 3. *Jurisdiction.* Held, the ground on which chancery jurisdiction was originally assumed, was, that though the party had a *legal title*, yet the remedy at law was *doubtful* or incomplete, and where a court of equity gains jurisdiction of a cause for one purpose, it may retain it generally. This important doctrine, as to remedy *incomplete*, the supreme judicial court of Massachusetts adopted in August 1828, in the Warren Bridge case. *Incomplete* remedy at law, seems to have been often construed in chancery to mean the same *as not the best remedy.* See Judiciary act of congress, Sept. 24, 1789, s. 16: no suit to be in equity, when '*adequate* and *complete* remedy may be had at law:' these words, this court construed as they have been construed in England and New York. Have they been so construed in Massachusetts? Has not here, a remedy in damages at law, been construed an adequate and complete remedy? See ch. 225.

10 Johns. R. 567—596, Rathbone v. Warren; Cain's Cas. in Error, 1, 39—58.

Art. 25. *Con.* A court of equity never enjoins a judgment at law, on the ground that it would have been reversable, if proper steps had been taken in the court of law, but by mistake, a confession of judgment had been entered. 4 Rand. 553–563, Farmers' Bank v. Vanmeter.

In fact, the writs of injunction are used principally, 1. To stay proceedings at law: 2. To prevent waste, and to enforce reparation for waste done: 3. To prevent and to remove nuisances, (including purprestures:) 4. To prevent infringements on copyrights and patents: 5. In sundry minor cases.

The subjects of these writs are frauds, mistakes, accidents: Their objects are relief to some person or party, in numerous cases. Mr Eden, in his late treatise on the law of Injunctions, republished in the United States in 1822, has enumerated generally, the particular subjects whereon this writ is used, in England: omitting those peculiar to that country, the following may be viewed as the *particular subjects* of this process, out of chancery, in the United States, or in some of them. To stay, restrain, forbid, and prevent, as above, and particularly to restrain the negotiation of negotiable papers, in certain cases: to restrain the sale of land or of a specific chattel: to prevent a ship's sailing, the transfer of stock, and debtors going abroad, in certain cases: to prevent the waste of property, real or personal, whilst the subject of litigation: to restrain a trustee from assigning the legal estate, or setting up a term of years; the commission of every kind of waste stated in ch. 78: the infringements of patents and copyrights, stated in ch. 61; to prevent all the various

kinds of nuisances stated in chs. 68, 69, 70, and 74: to continue, quit, or yield up the possession of lands: by the various modes of interpleader, and sifting the truth out of the litigating parties: to restrain the multiplication of law suits, in some cases, and to expedite the terminations of them in others.

CHAPTER CXCIV.

PLEADINGS—PRACTICE.

§ 7 *con.* The deft. endorsed his appearance on the *capias ad resp.* in the cause, on *Sunday:* held, void. Is no appearance. This can be but by filing *special* or *common* bail, or *entering an appearance* at the clerk's office. 20 Johns. 140; 6 Johns. 328. 1 Cowen, 209.

§ 13. Commission to stay proceedings. If the rule for one be obtained *after* four days in term, after issue joined, this, to stay the proceedings, must be directed by the court expressly, to have that effect: 2. If within the four days, the proceedings are stayed, of course, though nothing be said in the rule as to the effect: 3. Hence, unnecessary to say anything on the point. Jackson v. Woodworth, 18 Johns. R. 185.

§ 14. *Discontinuance.* Where the deft. gets his discharge on the insolvent act, or on the act to abolish imprisonment for debt, in certain cases, the plt. may discontinue without costs.

Husband and wife are sued on a bond executed by them jointly. The plt., before plea, is allowed to enter a *nolle prosequi* as to her, and amend paying costs of the amendment. Pell v. Pell, 20 Johns. R. 126.

§ 15. *Discontinuance irregular to refer a cause, &c.:* as in replevin in the common pleas, the parties, in writing, referred it to B, to decide it on legal principles. B reports to the common pleas, and judgment thereon. Held, this being a mere voluntary reference, and not under the statute, the cause was discontinued; and the common pleas having no jurisdiction after the reference, its judgment was erroneous. Camp v. Root, 18 Johns. R. 22.

§ 16. But in a suit not referable under the statute, the parties agree, in writing, and expressly consent and agree, that a rule of reference be entered, and that a judgment may be entered on the report of the referees, there is no error, and judgment on the report is valid. The cause was referred to three referees, who, or any two of them, to report. Two only, signed the report, and stated, the *subscribers* having heard, &c.; judgment on the report: on error brought, the court presumed all the referees met, and heard, &c.; if not so, the objection should have been made in the court below when the report came in. Gates v Russel in error, 17 Johns. R. 461. 18 do. 26.

§ 17. The supreme court of New York say, 'the rules and practice of the court of king's bench, are ours, in those cases not provided for by the rules of this court:' added in 4 Barn. 1 Cowen, 75, Cummings v. Edep.

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& Ald. 357, that court decided a writ of *scire facias* must lie in the sheriff's office four days, exclusive of the day on which lodged there, and of the return day also.

§ 18. The plt., in ejectment, noticed his cause for trial: he is stayed by rule, till the costs of a former suit are paid. The court will not nonsuit him in the first instance, for not going to trial on the notice; but order, that unless those costs are paid in a time named, the deft may then take judgment, as in case of a nonsuit. Deft. cannot move for such judgment till the pleadings are completed and brought to an issue. Proceedings not set aside for variance between the amount in the *ac etiam* and in the declaration. It seems, the special bail are liable only to the amount in the *ac etiam*.

Jackson v. Edwards, 1 Cowen, 596, 597. pp. 601—603.

§ 19. *Assumpsit*. Deft's. first plea, general issue; second plea false, at least, doubtful in point of fact. Plt. moved to have it stricken out with costs, on the ground it was construed, and was pleaded as a sham plea; done accordingly. The court said it was plainly a false plea, and they would not put the plt. to elect whether to answer or to demur to it. See Solomons *v.* Lyons, ch. 184, a. 7, s. 9. Cited 2 Salk. 515; 3 Taunt. 338; 1 East. 369, and Blewett *v.* Menden, 1 East. 237. See Sham Plea, ch. 180, a. 12, s. 1–4.

2 Cowen, 34—38.

ART. 3. *Con.*

§ 18. Judgment by default on the act of March 21, 1806, entered before the time was expired for the deft's. appearance, reversed. 4 Serg. & R. 237.

The power to the court to give judgment on default, the second term given by said act, it seems in the cases of bonds, is confined to those *conditioned to pay money;* and extends not to those with *collateral* conditions, as bail bonds, &c.

Boas & al. v. Nagle & al. 3 Serg. & R. 250.

§ 19. An attorney appears specially for one deft. in a suit against two, and as attorney for the one, confesses it is valid as to the one, and a *joint* execution is irregular.

5 Serg. & R. 294.

§ 20. An order for the plt. to furnish a bill of particulars, is not granted without affidavit, showing the necessity of it. Willis *v.* Bailey, 19 Johns. R. 268. Plt. is not obliged to state in it the deft's. credits. 15 do. 222; 16 do. 149.

§ 21. Two defts., A and B; A pleads, B is defaulted; the plt. cannot try the issue, and damages assessed against both, till an interlocutory judgment has been entered against B.

17 Johns. R. 270.

§ 22. Where a cause is removed by *habeas corpus* from the common pleas to the supreme court, the common pleas has no jurisdiction till a *providendo* filed, and till this be done, any proceedings in the cause, in that court, are irregular.

3 Cowen, 27.

ART. 4. *Con.*

§ 13 *con. Tennessee.* Held, the deft. in equity cannot except to the process after he has answered *in chief;* for such defence is a waiver, both at law and in equity of prior objections: *in chief;* this seems to be the true distinction, for it

Ferrill v. Rogers, 3 Hayw. 203.

seems, on the authorities and the reason of the case, the deft. does not waive *prior* objections when *he appears only to make them;* but the case is very different when he answers or pleads *in chief;* that is, goes on to try the merits. Vol. VI. Ch. 194. *Art.* 5. *Con.*

§ 26. If a rule of court require notice of taking a deposition to the opposite party, notice to his attorney is not sufficient. The person taking it cannot adjourn from time to time with consent and without notice. 2 Serg. & R. 70. 5 Serg. & R. 352.

§ 27. *Notice to produce papers* on the statute February 27, 1798, for the production of them; necessary, 1. The court in bank must make an order *before the trial* after fully hearing the parties on a rule to show cause: 2. If not had at the trial, the judge may direct a juror to be withdrawn, and the whole proceedings, appearing on the *postea*, the court may give judgment according to said statute, id.: 3. Every such order, must be founded on affidavit previously made, which must state with precision every fact necessary to authorize it: 4. Must be made on the plt. on record, and directed to the plt. *himself:* 5. Must be made *previous* to the trial, allowing the party the same time as to prepare for trial of an issue in fact: 6. The affidavit must contain a direct averment of the facts necessary to authorize the order; that the writ is pertinent to the issue, and was in the plt's. possession at the time of notice: 7. The notice must describe the book or paper required, with sufficient certainty. 5 Serg. & R. 244–245, Rose v. King. id. id. id.

Notice of motion for next term, is good without naming a particular day, means the first day of the term. 1 Cowen, 230.

§ 15 *con.* After appearance to an injunction bill, a copy is to be served on the deft. forthwith. Where a party meaning to except to the master's report in chancery, must state his objections on hearing the draft of it, as where he makes objections to the exceptions before the master, &c. After answer filed, the deft. obtains an exemption of his person, from imprisonment, under the act to abolish imprisonment for debt in certain cases, 42 sess. ch. 101. Held, he may file supplementary answer to present the fact: and he ought to avail himself of the exemption at the earliest day. Art. 6, is delay of trial. Art. 6. *Con.* 1 Hop. Ch. R 6. p. 7. p. 27.

On taking exceptions to a master's report, the party excepting is not bound either to make a deposite, or to set down the exceptions to be argued. Either party may set them down. No deposite in this court, except by express rule. 1 Hop. Ch. R. 98—100.

Negotiations between the parties for a settlement, excuse not a default in the regular proceedings of the court, without the express agreement of the parties. Petitions must be sworn to. And rehearing under the seventieth rule of the court, is of course, &c. 1 Hop. Ch. R. 101. p. 112.

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A party examined before the master by order of court on the matter in reference, may explain, but if heard as a witness, must be a new reference, generally, especially if a deft. is so heard on matters in reference to which the plt's. inquiries do not extend. Is not the rule a bad one, that enables the plt., to his own advantage, to get the deft's. testimony, in drawing from him only such parts of the truth as are for the plt., and against the deft.? 1 Hop. Ch. R. 229.

Keys v. Beardsley, 18 Johns. R. 126.

Putting off trial. If the plt. countermand his notice of trial, he must pay the deft. such costs as he has incurred after receiving notice of trial, and before the countermand.

Suydam v. Swart, 20 Johns. R. 476.

So proceedings in a cause referred, are stayed on affidavit stating a material witness is gone out of the State and is expected by a day named. When the plt. neglects to proceed or appear before the referees. 16 Johns. R. 45.

§ 26. *Security in error.* Under the judiciary act of 1789, ch. 20, s. 22, the security to be taken from the plt. in error, by the judge, signing a citation on a writ of error, must be sufficient to secure the whole amount of the judgment, and is not to be confined to such damages as the appellate court may adjudge for the delay. 9 Wheat. 553–555.

9 Wheat. 576–

§ 27. *Amendments*, &c. In ejectment, an amendment allowed to as to enlarge the term in the declaration, in the court's discretion: 2. Error does not lie, where the court below has denied a motion for this purpose. Several English and American authorities cited. The action of ejectment was in *Kentucky*, lessors admitted to defend in the place of the casual ejector, and entered into the usual rule, confessing the lease, entry, and ouster; all in the usual English manner.

Art. 7. *Con.*

§ 15. South Carolina. The deft. was served with a writ by a copy left at his house; he moved to set it aside on affidavit he was in Georgia, not saying he was surprised or was in danger of suffering injury, by not knowing of such service; not set aside, as the deft. might reside on the borders of the State, and might only have gone into his fields, or any small distance out of the State, to avoid the service of legal process upon him. 1 McCord, 566.

§ 16. The plt. in replevin, is bound to file his declaration within a year and a day, and post his rule to plead as other plts. 1 McCord, 407.

2 Nott & Mc Cord, 291–293.

An attorney neglected to enter his appearance, whereby there was judgment by default against the deft. After the adjournment, the court refused to set aside the proceedings and to permit him to enter an appearance.

1 Bay, 407.

§ 17. All motions for leave to plead double, must be made in the circuit court, sitting the court and not before a judge at

his chambers, or before the constitutional court of appeals, which has no original jurisdiction. 1 McCord, 464. To make a sheriff a party in court, he must be proceeded against by process, as other persons are.

18. A deft., omitting to enter his appearance and to file his plea, cannot move to enter up judgment of *non pros*; it ought to be entered the first term. Accepting the service of a writ, is no appearance, it only waives the sheriff's service. 1 M'Cord, 408. 2 Nott & Mc Cord, 548.

Deft. allowed to withdraw his demurrer and to plead *de novo*, on paying costs. 1 Nott & McCord, 104.

§ 19. Where the parties go to trial on imperfect pleadings, the one in fault, shall not take advantage of his own wrong. 1 M'Cord, 206.

On a *scire facias* or *audita querela*, there can be pleaded only something arising *after* the action. 1 Bay, 491.

§ 20. Where A is indicted for forcible entry and traverses the force, a writ of restitution will not be granted till the question of force is tried; but A will not, as a matter of course, be allowed a term, as in other cases of misdemeanors, in which the deft. is entitled to an imparlance, to the next term after the indictment is found. It is in the court's discretion to continue a cause on the part of the State. 2 Bay, 96. 1 McCord, 177. 2 Nott & Mc Cord, 121, The State v. Dayly.

When a woman is brought up to receive sentence of death, after conviction, she may plead pregnancy, and the court will adjourn from day to day, until a jury of matrons are summoned to make their inquiry concerning the matter of her plea. 1 Bay, 499.

§ 21. No writ of error is allowed in South Carolina, as every advantage to be derived from it may be taken by motion, in the constitutional court of appeals. 2 Bay, 333.

§ 22. After verdict, the court will not arrest judgment, because the writ is tested by the clerk and signed by the deputy clerk. 1 Murph. 334.

§ 23. If in detinue, the jury find for the plt. and assess damages for the *detention* of the property, but omit to find the *value of it*, the court will award a writ of inquiry to assess the value, and not order a new trial. Key v. Allen, 2 Murph. 523.

§ 24. In an action against two, on a joint contract, where the sheriff returned as to one, he was out of the State, and the declaration stated the facts. Held, the plt. could not proceed against the other. The practice is different in several States. Where a judge has granted an order to docket a cause, the order can be set aside only in the constitutional court. McCall v. Price, 1 McCord, 82. 1 McCord, 172.

§ 25. Where the plt. brings two summary processes on two distinct notes, against the same deft., the court will not consolidate them, if the amount of both notes exceeds the summary jurisdiction; nor will the court compel consolidation, Parrott v. Green, 1 Mc Cord, 531.

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where several actions of dower are brought against distinct defts. Scott v. Cohen, 1 Nott & McCord, 413.

§ 26. The court may allow one of several plts. to discontinue, where he appears to have no interest in the cause.

1 Nott & Mc Cord, 568.

§ 27. In all cases where papers in the possession of one party are called for by the other, *the whole* ought to be produced, subject to legal exceptions, and where any document or paper is referred to by another, which is admissible evidence, such document, so referred to, must be produced.

Thompson v. Ward, 2 Litt. 151.

§ 28. A personal action cannot be maintained in a county where none of the defts. can be found, by sending the subsequent process into another county and having it executed there on all of them. *Secus*, where the defts. remove after the commencement of the suit.

Dicken v. Smith, 1 Litt. 211.

§ 29. In an action of covenant for the payment of a certain sum, the judges may assess the damages; and so, when they can do this without a jury, they ought to set aside a verdict, where the damages are unjust and excessive.

Shearer v. Clay, 1 Litt. 263.

§ 30. A motion to remand a cause which has been removed by change of venue, ought to be held to the same strictness in point of time, as pleas in abatement.

Porteous v. Gevins, 2 Mc Cord, 48.

§ 31. In an action of debt the verdict was for damages beyond the *ad damnum*. The court ordered a new trial, unless the plt. would release the excess. This he refused to do. Held, that after such order, and before final judgment, a judge, at chambers, might allow the plt. to amend his record by increasing the damages from ten to one thousand dollars.

CHAPTER CXCV.

COSTS.

Art. 1. Con.

§ 10 *con.* In trespass defts. pleaded *severally*, and had several judgments. Plt. appealed and neglected to enter his appeal. Held, each deft. entitled on his separate complaint to affirmation of his own judgment independent of his co-deft.

1 Greenl. 13.

9 Wheat. 650.

If the writ of error be dismissed for want of jurisdiction no costs are allowed.

Art. 2. Con.

§ 1 *con.* When an administrator commences an action and fails, he pays costs *de bonis propriis*. Extended to every case. After payment he may charge the same in his account of administration, to be allowed or not, as it may appear to the judge of probate, that the suit was discreet or otherwise. An infant plt. is liable to costs.

16 Mass. R. 550–553.—1 Pick. 275.

16 Mass. R. 448, Crocker v. Black.

§ 2 *con.* This was an action on the case for obstructing a

private way. Damages laid $50. Recovered $11. Full costs allowed, as the title to real estate may come in question in this action as well as in trespass, 'and indeed must necessarily.' The plt. *must* show possession at the least.

£4.—now $20. Trespass, assault, &c. commenced in the common pleas. *Ad damnum* over $100, the judgment for the deft. The plt. appealed to the supreme judicial court. In this the plt. recovered $1 damages. Judge certified on statute 1820, c. 79, s. 4, the plt. had reasonable cause for the appeal. Costs for the plt. twentyfive cents, one quarter, on the construction of the acts 1807, c. 123, s. 2, and 1820, c. 79. The deft. claimed costs, on the appeal, on the latter act section 4, which provides (in such an appeal as above) if the debt or damages demanded exceed $100, and the plt. appeals and recovers not above $100 above, he recovers no costs on his appeals, but the deft. has his costs thereon, &c. except the judge certifies as above. These acts, March 11, 1784, 1807, and 1820, must all be construed together. 1 Pick. R. 236-238, Godfrey v. Godfrey.

§ 5. Covenant broken. Held, where both parties file exceptions, and the plt. prevails on the deft's. exceptions and waives his own, the deft. is not allowed costs on the plt's. In a court of equity, as in a court of law, the prevailing party is *prima facie* entitled to costs. On a bill in equity to redeem, the supreme judicial court may, by statute 1798, ch. 77, at discretion, award costs to either party, as equity may require, and if the deft. fail in his defence, having attempted to deprive the plt. of his right to redeem, by objections, some of which were groundless and unreasonable, and the plt. also was in fault, having claimed to have the mortgage discharged when only a part of the mortgage debt was due and payable, neither party was allowed costs. Copies of deeds from the register's office, used in a trial, are taxed in the bill of costs, at the legal rate, according to stat. 1795, ch. 41. Pick. 187, 189, Dewey v. Humphrey. p. 250. p. 540.

§ 7 Costs arising before referees and costs of witnesses on the question of accepting their report are taxable for the party recovering judgment, though the referee's report be not accepted. ART. 3. *Con.* 16 Mass. R. 450.

§ 15 *con.* 1 N. H. R. 36–39, same principle. Costs for each party in replevin as each prevailed on certain issues.

§ 32. This was case against six defts., a case like conspiracy. Defts. pleaded, severally, not guilty. All acquitted, &c. Held, each deft. was entitled to costs for his travel, attendance, and attorney's fee. 'But all the other charges must be single.' A declaration so formed cannot be amended to make it a declaration in conspiracy. 1 Pick. R. 452–459, Mason v. Waite, &c.

Trespass against three, all join in their plea in the common 3 Pick. 303.

Vol. VI. Ch. 195. Art. 3. Con.

pleas: that demurred to. In the supreme court, plea waived. Pleas, severally: two acquitted: two recover joint costs to the time of severing in their pleas and several costs afterwards; also two thirds of the costs of depositions, and witnesses summoned for all three, &c.

Art. 4. Con.

§ 8 *con.* New York. No costs are allowed by the husband against his wife upon divorce for adultery, unless she have separate property, but in the converse case costs are allowed. Where she is deft. she is presumed to have no means to pay costs, unless she have separate property.

1 Hop. Ch. R. 100, 101.

1 Hop. Ch. R. 117.

Plt. a non resident must give security for costs, though his solicitor is liable; but only in $100, without special cause.

1 Hop. Ch. R. 344–347.

Where a creditor recovers a debt in chancery, he recovers costs also, but special exceptions: generally of the whole litigation, though the plt. fail as to a part of his demand. If part of the demand be against the deft. in *autre droit*, and part in his own, all contested in one suit, by consent, all the costs are against the deft. *personally*. Generally, as to exceptions to the master's report, each party recovers the costs of those exceptions on which he succeeds and pays costs as to those on which he fails.

17 Johns. R. 109.

§ 59 *con.* Suit in the supreme court, from the small amount recovered, the plt. can have only common pleas costs, &c. 11 John. 405.

On a motion to change the venue no costs to either party, but they abide the event of the suit. Norton *v.* Rich, 20 Johns. R. 475.

Bennett *v.* Rathbun, 17 Johns. R. 37.

§ 60. *Double costs.* Trespass in a justice's court. Plea, title. The plt. then sued in the common pleas. Deft. removed the cause by *habeas corpus* to the supreme court, and the plt. recovered damages and double costs on the seventh section of the act of April 5, 1813. 12 John. 340, 459, 500.

Nichols *v.* Ketchum, 19 Johns. R. 167.

§ 61. Where an officer is sued and the plt. recovers less than $50 damages, deft. recovers single costs, on the act, sess. 36, ch. 96.

Gibbs *v.* Bull, 20 Johns. R. 212.

In replevin, demurrer to one of the counts, issue on the others. Judgment for the deft. on the demurrer, and verdict for him. Held, entitled to single costs on the demurrer and

pp. 196, 237.

double costs on the issues. 13 John. 435, 345, 465, several cases.

§ 62. 1 Cowen, 231, 232, Griswold *v.* thirtytwo terretenants of Walton. They lived in one village, five miles from the court house. Fees for serving a *scire facias* on them, fifty cents for serving each writ, beside mileage, each; return, twelve and a half cents each, and two summoners for each, at fifty cents. Taxing, &c. seventyfive cents; returning the writ twelve and a half cents: in all $74 35¼.

§ 63. Where several defts. appear and plead by *one attorney*, only one retaining fee is allowed against the plt. *Aliter* when they appear by different attornies. 1 Cowen, 233. Vol. VI. Ch. 195. *Art.* 4. *Con.*

§ 64. Several defts. are jointly sued and a *nolle prosequi* entered as to one, an infant; held, he is not entitled to costs of course: 2. Where the common pleas, refused costs in such case no *mandamus* lies. Allowing them in such case or not is matter of discretion, and where exercised, the supreme court has no power to interfere by *mandamus*; and if error, a writ of error is the proper remedy; and ch. 186, a. 2, s. 93; was *assumpsit*.

§ 65. In New York costs are allowed to attornies, &c. for preparing causes for trial, or for motion. 1 Cowen, 429.

§ 66. An alternative *mandamus* had been granted at a preceding term. On a hearing, held, 1. On an appeal from a justice's court, a court of common pleas cannot restrain the appellant from proceeding till security for costs be given on the ground he is a non resident of the county: 2. The security necessary is only that required by the act sess. 41, ch. 94, s. 17. By this the condition of the bond required is to pay the judgment and costs. The common pleas had given judgment for the appellee on default of the appellant. Peremptory *mandamus* ordered. The court will not hear a motion to retax a bill of costs on a point not made before the taxing officer, &c. The People v. Judges of the Common Pleas, 1 Cowen, 576–579. 1 Cowen, 591, 592.

§ 67. *Double costs to officers.* *Assumpsit* for money had and received. Held, statutes giving double costs to certain officers who prevail when sued 'for or concerning any matter or thing done by virtue of their offices,' (as in sess. 43, ch. 122, s. 2, relative to school trustees,) apply only to acts of *malfeasance*, not to those of *nonfeasance*, as detaining monies they may have officially received. Curia, 3 M. & S. 131, 'is in point and contains the true distinction.' In construing this and the like statutes, allowing double costs, there is a distinction in reason, as well as authority, between acts of *misfeasance*, and those merely of *nonfeasance*. The latter is often a mere omission to fulfil a contract, which does not call for the protection of the statute. Defts., as such trustees, were sued for monies they had rightfully received. Platt v. Osborn & al. 2 Cowen, 527, 528. 3 Cowen, 17.

§ 68. In assault and battery, on *habeas corpus* from the common pleas, 1. Verdict for the plt. $25. New trial, *with costs to abide the event*, &c.: this was *discretionary*. Second trial, verdict for the deft. He had costs of both trials. By the practice of the court of king's bench, deft. would have had only the costs of the last verdict. See art. 1, s. 5; art. 6, s. 2; Austin *v.* Gibbs, 8 D. & E. 619; ch. 79, a. 10, s. Carvey & wife v. Rider, 2 Cowen, 617–619.

VOL. VI. CH. 195. *Art.* 4. *Con.*

23; Smith *v.* Herle, 6 D. & E. 71; 1 B. & A. 566; 1 R. L. of New York, 343, 344; 5 Burr. 2693.

§ 69. Only one set of papers taxed, where there are the same plt. in ejectment, the same lessors, though different defts., the same attornies in all the causes; the same motion is made in each, on the same grounds; for in such cases, one set of papers is sufficient. 18 Johns. 310; 20 id. 274.

Jackson *v.* Clark, 4 Cowen, 532, 533.

§ 70. If on motion the common pleas dismiss an appeal, because never possessed of the cause, and had no jurisdiction of it, no costs can be allowed, but those of the motion. Appeal cause was noticed for trial several times in the common pleas, and finally dismissed, on the appellee's motion, after the trial had proceeded some time, on the ground the appeal bond was defective. Held, the court, even if it had the power, ought not to have allowed to the appellee any costs but those of the motion: 2. An appeal bond must be conditioned that if the appeal be not prosecuted with due diligence the appellant shall pay the costs of the appeal.

6 Cowen, 592, Benson's case. p. 593, case of Mallard.

ART. 8. *Con.*

§ 9. This was a suit brought in the Winchester chancery court by A. *v.* K. The decree was in favor of A on the matter in controversy, but required each party to pay his own costs. The plt. appealed from so much of the decree as required him to pay his own costs. Held, the appeal could not be taken from said court on the ground the appellant had been improperly decreed to pay costs.

3 Rand. 165—167, Ashby *v.* Kiger.

Mahone *v.* Long, 3 Rand. 557, 558.

§ 10. The appeal from the chancery court was brought up by the appellee, and he moved to have the appeal dismissed. Dismissed accordingly; and ordered the clerk's fee in the chancery court for the copy of the record, filed above, be taxed in the bill of costs, as a part of the costs of defending the appeal; and held, the same rule exists where the record is brought up by the appellant.

Stanley *v.* Hodges, 1 Taylor, 274.

§ 11. Before the act of 1796, witnesses in North Carolina could not pursue a common law remedy against the party that summoned them, until recourse was first had against the party cast, according to the direction of the act of 1783.

Byrd *v.* Rouse, 1 Car. Law Rep. 384.

§ 12. In actions of slander the plt. has costs of two witnesses, to prove the first speaking of the words, and two for each repetition of them.

CHAPTER CXCVI.

STATUTES.

ART. 1. *Con.*

§ 7 *con.* If one statute prohibit a thing and another gives a penalty, then a suit for the penalty, both must be recited,

and the conclusion be *contra formam statutorum*. But it is otherwise where the statute is only revived. 2 East, 333–342, Lee *v.* Clark, in error; 7 East, 516; 2 Saund. 377, n. 12; 4 D. & E. 109; 2 Stra. 1066; Cro. J. 142; Cro. El. 750; Salk. 212; 2 id. 505–609; 6 Mod. 62.

The benefits of checks in the enactment of statutes. One instance, as in New York, it seems the council of revision, before the year 1823 and from 1777, exercised its power upon six thousand five hundred and ninety votes passed by the legislature in about forty six years; and the council objected to one hundred and twentyeight, the largest part as unconstitutional, and only seventeen passed, the objections notwithstanding. Kent in his Commentaries, 1 vol. p. 426, observes the records of the council show that many a bill that had heedlessly passed the two houses of the legislature was objected to and defeated on constitutional grounds, and 'that these records are replete with the assertion of salutary and sound principles of public law and constitutional policy, and will forever remain a monument of the wisdom, firmness, and integrity, and of the great value and benign influence of the institution.' Now as after the objections were made in one hundred and twentyeight cases the legislature had an opportunity again to consider the acts and pass them, and passed only seventeen of one hundred and twentyeight, the evidence is clear the objections, generally, were well founded in the opinion even of the legislature, and that the acts were passed hastily, as they too often are when checks are not interposed: 2. If so in this State itself, and a great and wise one too, well may each State less more rarely, as has ever been the case, expect its acts will be found, by federal authority, to be unconstitutional and repugnant to the constitution, laws, and treaties of the United States.

§ 42. *Massachusetts statutes, how they cease to be in force in Maine.* As wherever the legislature of Maine appears to have revised the subject matter of any statutes of Massachusetts, and enacted such provisions as they deemed suitable to the wants of the people of Maine, the former statutes are to be considered as no longer in force here, though not expressly repealed. 3 Greenl. 22–27, Fowle *v.* Marrett.

§ 43. The general principle affirmed, that is, if a statute give a remedy in the *affirmative* (without a negative, expressed or implied) for a matter which was actionable at common law, the party may still sue at common law, as well as on the statute, as this does not take away the common law remedy. Hence, an act authorizes A to build a dam on his own land, on a creek or river, *a public highway*. The act merely pro- Chmo)den *v.* Wilson, 5 Cowen, 165–168.

tects A from an indictment for a nusance. But if in so doing he flows B's land, B has his action against A, though the act provides a summary mode of appraising and paying the damages arising from such a consequence. The action was case. The deft. pleaded the act as his protection, and his complying with it, &c. General demurrer to the pleas and joinder. Judgment for the plt. Deft. cited 17 John. 195; 20 id. 103, 735. The court said the deft. took the legislative grant 'subject to the restriction *sic utere tuo ut alienum non laedas.*' See ch. 187, Courts, s. 7, s. 51.

2 Inst. 200.—Com. Dig. Action upon Stat. (C).

ART. 2. *Con.*

§ 1 *con.* Same principle where a statute expires. An offence against a temporary statute cannot be punished after the expiration of it, unless a particular provision be made by law for that purpose.

7 Wheat. 551, 559.

§ 6. The word *void* in statutes and reports is often to be construed *voidable*. The subject largely considered, 2 N. H. Rep. 51, 56.

§ 37. *Statutes in Maryland.* Maryland adopted all the English statutes, applicable to her situation, enacted before her settlement commenced, and many enacted after.

§ 38. *A defective libel amended on the slave trade act of March* 2, 1807, ch. 77. Was a libel of information alleging the Mary Ann sailed from the ports of *New York* and *Perth Amboy*, without the captain's having delivered the manifest required by law to the *collector* or *surveyor* of *New York*, or *Perth Amboy*, this libel was defective, as the act required the manifest to be delivered to the collector of a *single* port: 2. Libel must state the vessel to be of the burden of forty tons or more: 3. If the libel be so formed and defective that the court cannot render judgment on it, and the evidence shows a case of forfeiture, the supreme court of the United States will not amend the libel itself, but will remand the cause to the court below with directions to permit it to be amended. See cases of seizure, ch. 224.

8 Wheat. 381–391, The Mary Ann.

§ 39. This was an information under the *slave trade act* of 1794, ch. 187. Held, a libel in such case does not require all the technical precision of an indictment at common law. Stating what is sufficiently correct. As soon as the preparations have proceeded so far as clearly to manifest the intention the right of seizure attaches.

9 Wheat. 381–390, the Emily, &c.

The like want of technical precision allowed in admiralty proceedings. It is enough the information state the offence so as clearly to bring it within the statute on which founded. Need not be *contra formam statuti*. The prosecution must be in the district in which the seizure is made and not where the offence was committed. See slave trade acts, May 10, 1800,

9 Wheat. 391–408.

ch. 205, April 20, 1812. Cases of the Merino, the Constitution, and the Louisa.

§ 40. *Wages of seamen, &c. in these slave cases.* Seamen and material men if innocent as to the slave business have liens and wages, &c. No wages, if they knowingly join in the slave trade, out of the proceeds of the forfeited vessels; but they and material men, if wholly innocent, are preferred to the claim of forfeiture on the part of the government. Material men have a lien, which may be enforced by a proceeding in the admiralty, *in rem*, for necessaries or supplies, furnished in a port to which the vessel does not belong. 9 Wheat. 409–420, the St Jago de Cuba.

§ 41. Another slave case, 10 Wheat. 66 to 133, the Antelope, the Vice Consuls of Spain and Portugal libellants. Many points decided, some of them before decided. One decided now is important, that is, that the *African trade* is contrary to the law of nature, but is not prohibited by the positive law of nations: 2. It may be lawfully carried on by the subjects of those nations who have not prohibited it by municipal laws or treaties. 11 Wheat. 413, 414.—12 Wheat. 546–554.

10 Wheat. 133–146, the Plattsburgh, another slave case. To incur the forfeiture, it is sufficient if any preparations are made for the unlawful purpose.

§ 42. The powers of the district courts. To constitute a valid seizure of a slave vessel there must be actual possession. See this case ch. 227, s. 75; see ch. 96, a. 4, s. 4, &c. 10 Wheat. 312–332, the Josefa Secunda.

CHAPTER CXCVII.

CRIMES AND PUNISHMENTS.

§ 12. Baker *v.* the People, 3 Cowen, 686–709, held, 1. The amendment in the federal constitution that provides that cruel and unusual punishments shall not be inflicted, only respects the Union, and not the several States: so understood in Ohio, Tennessee, Indiana, and Maine, which States have since 1791, adopted the principle expressly: this they would not have done, had they supposed this federal provision binding on them: so have Kentucky, Mississippi, and Alabama done, on the same ground: 2. The constitution of the United States, does not regulate the punishment of crimes against a State, except it provides that no State shall pass any bill of attainder or *ex post facto* law: 3. The power of the legislature, in the punishment of crimes, is not a special grant of limited authority, but a part of the legislative or sovereign power of the State, to maintain social order, and to take life, liberty, and all the rights of both, when the sacrifice is necessary to the peace, order, or safety of the community.

Vol. VI. Ch. 197. *Art.* 4. *Con.*

§ 5 *con.* It is the law and usage of nations, to deliver up offenders, charged with felony and other high crimes, and who have fled from the country in which the crime was committed: 2. And for that purpose, the civil magistrate may commit them for a reasonable time: 3. Therefore, where a person, charged with having committed a theft in Canada, thence fled into New York, the chancellor held, that if sufficient evidence of the commission of the crime appeared, he might be detained.

Washburn's case, 4 Johns. Ch. R. 106.

Art. 5. *Con.*

§ 2 *con.* *Torturing* a person accused of a crime, in order to extort a confession, is contrary to the constitution and laws of Vermont, and is an indictable offence. So is the law in every State in the Union.

State v. Hobbs, 2 Tyler. 380.

Art. 10. *Con.*

§ 10 *con.* The accessory, in a capital felony, cannot be put on his trial, without his consent, if the principal be dead, without conviction, nor till the conviction of the principal, if living. 16 Mass. R. 423–426.

1 Const Rep. 241.

The court in its discretion, may permit an *accessary* to be tried separately from the principal.

Art. 11. *Con.*

§ 11 *con.* In the new commercial code of France, there are many crimes and offences punished, all tending to make traders, merchants, &c., honest and fair in their dealings: book 3 of Failures and Bankruptcies, pages 245 to 315.

CHAPTER CXCVIII.

CRIMES, &c., AGAINST RELIGION AND MORALITY.

Art. 2. *Con.*

§ 6. 1 Barn. & Cres. 26, held, a publication stating Jesus Chrsit to be an impostor and a murderer, in principle, is a libel at common law. It seems, that the 53d of Geo. 3, ch. 160, does not alter the common law, but only removes the penalties imposed on persons denying the Trinity: by 9 and 10 W. 3, stat. 1, ch. 32, and extends to such persons, the benefits conferred on all other Protestant dissenters; by 1 W. & M. stat. 1. ch. 18: Best, J. observed, that the deft., Waddington, argued 'against the divinity of Christ, by denying the truth of the scriptures. A work containing such arguments, published maliciously, (which the jury in this case have found,) is by the common law, a libel, and the legislature has never altered this law, nor can it ever do so, whilst the Christian religion is considered to be the basis of that law.' The other judges only stated, that a publication stating Jesus Christ to be an impostor and murderer, in principle, is a libel at common law. So far, some American decisions have proceeded. Some English and American hold, Christianity is a part of the common law; but no one is recollected, that considers Christianity the *basis* of the common law. We find the *basis* of the common law existed in England before

Christianity was there received. The idea it has been made, at some period, part of the common law, has been often expressed in that country and in this: but no decision or *dictum* is recollected, expressing what *sect or sort* of Christianity is thus a part of this law. If a part, undoubtedly it was made a part before the reformation in England, that is, when Christianity in England, was *Roman Catholic;* and it was *Roman Catholic Christianity* that was first, and for centuries, this part of the common law. There is no decision found showing when, in England, *Roman Catholic* Christianity ceased to be, and *Protestant* Christianity became a part of the common law. Perhaps, the idea is, at the reformation.

For near three centuries, *Trinitarian Christianity*, in England, was this part of the common law, and probably so viewed in our Colonies: clearly it is not so now in all our States, if in any of them, or even in England. As Christianity, among numerous sects and denominations, is so various and fluctuating, that some doubt, if it be correct to say that Christianity is a part of the common law; but the true principle is this; the law of the land wisely protects the religion of it, against *malicious* publications, which attack or deny it, with a view to destroy it, and not with a view, candidly and fairly, to substitute some other religion, conscientiously believed to be better than Christianity, or better than the existing popular Christianity. In many important cases, one kind of Christianity has been beneficially written down, and another substituted: so one kind of religion has been often beneficially written down, and another substituted. On the whole, it seems to be the *writer's malice*, as to which, the jury judges, what is essential to constitute a libel; and this, the jury found in Waddington's case.

§ 9. In an action of trespass for laying hold of the plt., and detaining him a long time. Plea, done as a Tythingman on the Lord's Day. Act of New Hampshire, passed Dec. 24, 1799, which authorizes selectmen and tythingmen to arrest persons suspected of travelling unnecessarily on that day; held, to be a constitutional law. The plt. relied on the 15th and 19th articles of the N. H. Bill of Rights, exempting a person from arrests, &c. But by the judgment of his peers, or the law of the land, &c., the court, on the authority of 2 Institute, 50, thought the words 'the law of the land,' mean *due process of law*. Cited Smith *v.* Herman, ch. 196, a. 5, s. 13: *magna charta*, ch. 29, 2 Co. Inst. 45–52; Sullivan's Lectures, 402; 2 Haw. P. C. 115. In fact, an arrest according to *the law of the land*, means any arrest authorized by the common law, or by statute: so this decision, and Dr Sullivan, Lord Coke, &c., explain these words, so long and so often repeated, as securing individual liberty: again considered in the same

1 N. H. Rep. 53—60, Mayo *v.* Wilson & al.

VOL. VI. CH. 198. *Art.* 8. *Con.*

volume, pages 129, 130, &c.; and the court cited the 12th article in said bill of Rights, which declares that 'no part of a man's property shall be taken from him, or applied to public uses, without his consent, or that of the representative body of the people:' omitting compensation provided for in Massachusetts constitution.

ART. 9. *Con.*

§ 4. The deft. was indicted for the crime of adultery, on statute of 1784, ch. 40. He had been divorced for that crime, and married another wife in Connecticut, living the first, and cohabited with the second: not guilty of adultery, as the marriage in Connecticut was lawful. He should have been indicted on the second section of the said act. This case shows, that a man divorced for adultery, in Massachusetts, and who cannot there marry another, may lawfully marry another wife, in another State, and this marriage must be allowed to be legal in Massachusetts.

1 Pick. R. 136—140, Commonwealth v. Putnam.

Adultery, in 1828, was punished as follows.

In Maine, solitary imprisonment, not exceeding three months, and confinement to hard labor, not exceeding five years. Bigamy the same.

In Vermont, State prison, not exceeding three years, and fine, not exceeding $1000, or either. Polygamy the same.

In New Hampshire, common jail, not exceeding one year, by fine, not exceeding $400, and sureties of the peace, not exceeding five years, or by one or more of these punishments. Polygamy near the same.

In Rhode Island, fine, not exceeding $200, and imprisonment not longer than six months.

In Connecticut, man, in State prison, woman, in the common jail; not longer than five, nor less than two years.

In Delaware, fine $100.

ART. 11. *Con.*

§ 1 *con.* And if one knowingly lease his house for prostitution, he may be indicted: 3 Pick. R. 26–31, Commonwealth v. Harrington: and exciting, encouraging, and aiding one to commit a misdemeanor, is of itself a misdemeanor. The King v. Phillips, 6 East, 464, ch. 218, a. 2, s. 26.

CHAPTER CXCIX.

CRIMES AGAINST THE STATE.

ART. 10. *Con.*

§ 18. *What is a case affecting public ministers or not.* This was an indictment on the crimes' act of congress of April 30, 1790, for an infraction of the law of nations, by offering violence to the person of a foreign minister, and contrary to the said act. Verdict of guilty, in the circuit court. Deft. moved in arrest of judgment, and assigned for cause, 'that the circuit court has

11 Wheat. 467—475, U. States v. Ortega.

not jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador, or other public minister. The circuit judges were opposed. Held, that court had jurisdiction of the offence, and that it was not one affecting the minister—he was no party; but the offence was against the United States, and the law of nations.

Vol. VI. Ch. 199. Art. 10. Con.

CHAPTER CC.

FELONY.

§ 13 *con.* Four persons were indicted for conspiracy; two pleaded not guilty; one in abatement: to this plea there was a demurrer. The fourth did not appear. One who pleaded not guilty, was acquitted, and the other was found guilty of conspiring with him who pleaded in abatement. Afterwards, the demurrer was argued, and judgment of *respondeat ouster* given; thereon, not guilty was pleaded. Held, the court might, before the trial of that deft., pronounce judgment on the one that had been found guilty.

Art 1. Con. 5 Barn. & Cres. 538.

1 Barn & Cres. 37–55, Cox *v.* Coleridge, &c., held, when a person is examined before a magistrate, under a charge of *felony*, he is not entitled, as of right, to have a person skilled in the law, present, as an advocate on his behalf, it being a preliminary investigation only, and not conclusive on him. It appears, the plt. was an attorney, and the felon engaged him to assist him before the two justices, (defts.) and they refused to admit the plt., and gently laid hands on him and turned him out of their room: therefore, he brought trespass: they justified: he replied specially his whole case: they demurred to his replication: judgment for them on the principle above stated.

§ 15. The People *v.* Schuyler, 6 Cowen, 572–575, held, it is felony for a man who elopes with another's wife, to take his goods, though with her consent, and at her solicitation. Decided on the conviction of grand larceny, October 1826, on *certiorari* accompanied with a case.

Russel on Crimes, 26, 27

§ 6. *Mutiny and revolt.* Though the Crimes act of congress of April 30, 1790, s. 12, does not define the offence of *endeavouring to make a revolt*: it is competent for the court to give a judicial definition of it: 2. The offence consists in the endeavour of the crew of the vessel, or any one or more of them, to overthrow the legal authority of the commander, with intent to remove him from the command, or, against his will, to take command of the vessel, by assuming the government or navigation of her, or by transferring their obedience from the lawful commander to some other person.

Art. 7. Con. 11 Wheat. 417 419, U. States v. Kelly & al.

§ 7. *Martial law* in New York. Citizen not in military service, is not amenable to a court martial. A citizen of the

Smith v. Shaw, 12 Johns. R. 257.

Vol. VI. Ch. 200. Art. 7. Con.

United State, is arrested as a *spy*, and held in custody till the fact can be tried by a court martial. The party arresting, and the commanding officer by whose order he is detained in custody, are trespassers. 19 do. 7.

Schuneman v. Dibles, 14 Johns. R. 226.

§ 8. The martial law is not altogether a written law, but is composed, in part, of military usage, when it is reasonable, or not contrary to special enactment: 2. A soldier arrested and imprisoned, may be held to perform such duty as he is capable of, while restrained, and may be compelled to perform by further restraint: 3. An officer, civil or military, may increase the rigor of confinement, to prevent escape. See ch. 186, s. 4, s. 13–19.

CHAPTER CCI.

CRIMES AGAINST PUBLIC POLITY, &c.

Art. 5. Con.

§ 16. 4 Bibb. 400. Where A is indicted for an assault and battery, and judgment is rendered thereon; and for the same an action is afterwards brought, evidence of the judgment on the indictment is inadmissible in mitigation of damages. Read v. Kelly.

Ford v. Logan, 2 Marsh. 325.

§ 17. If A be indicted or sued for *wounding* B, A cannot justify in defence of the possession of his close. Though such *wounding* cannot be justified, yet if the intruder in his attempt, assaults the possessor, or his family, the possessor resisting the attempt may wound the aggressor; but in such case, the plea must specially set out and rely on the assault, and not on the intrusion.

2 Marsh. 276

CHAPTER CCII.

BARRATRY.

§ 13. 32 H. 8. ch. 9, is in force in Maryland, and has been practised upon. 4 Har. & McH. 503.

Art. 9. Con.

§ 2. *Champerty* being an offence at common law, is to be presumed to be against the law of another State, the contrary not appearing. The plt., an attorney and counsellor, in Massachusetts, rendered services in New York, and entered into a written agreement in Massachusetts to receive ten per cent. for his services, on the sum that should be recovered. Held, a void agreement, but that the plt., Thurston, might recover on a *quantum meruit* for his services previous to the making of the agreement.

1 Pick. R. 415 -418.

A claimed land as heir to his father, and, about to sue to recover it, agreed with the plt., his brother in law, and covenanted in consideration of the premises, &c. to convey to the plt. one fourth part of the property which should be recovered, and the plt. in consideration of such covenant, &c. promised A to pay, bear, and sustain, one half of all the expenses, which might arise in the intended suits, &c. Held, illegal and champerty, and void under the first section of the act to punish champerty and maintenance. Held, 2. The illegality of the agreement is a good defence for the deft. who, as attorney of A, had received a large sum of money on a compromise of the suits brought by A, in an action of *assumpsit* against the deft., to recover one fourth of the money: 3. To make such an agreement illegal and void for champerty, it is not necessary that the land be held *adversely*. See below.

Thalimer v. Brincherhoff, 20 Johns. R. 386.

But the act of Kentucky of 1798, as to *champerty* and *maintenance*, does not merely release the contracting parties from the fine, &c. imposed by prior laws, but makes the title valid and the conveyance effectual to pass the lands; and wherever the original title was derived from Virginia, the act operates, however numerous the conveyances may be between the patentee and the plt. Where a town was established before said act of 1798 took effect, the trustees of it were not invested with a legal title to lands held *adversely*, included in the town; and their entry on the lots not so held, did not extend to those so held. Young *v.* Kimberland, 2 Litt. 225.

Adridge v. Kinsaid, 2 Litt. 393.

The above cause, brought by error from the supreme court to the court of errors; said judgment was unanimously reversed, and held no *champerty* or *maintenance*, and the plt. entitled to recover in *assumpsit* for money had and received, one fourth part of the money obtained by compromises of the affair. Other points held: 1. Even now a *part* of a chose in action cannot be transferred: 2. There is no champerty if the party who aids in the suit has any kind of interest in the thing sued for not acquired by his bargain to maintain, or if he is any way connected with the suitor in some social manner or relation. It is enough though such interest, great or small, vested or contingent, certain or uncertain. So if there be consanguinity or affinity between the suitor and person aiding. So if there be the relation of landlord and tenant, master and servant; so acts of charity to the poor, or the exercise of the legal possession. In none of these cases is there maintenance. So a husband, whose wife may, by possibility, be heir of one who claims land, may maintain the suit of the claimant, brought to recover the land, on an agreement to have a part of it. In this case, the aider's wife was sister to the claimant, and might possibly be his

Thalimer, plt. in error, v. Brincherhoff, deft. 3 Cowen, 623–651.

Vol. VII. Ch. 202. *Art.* 9. *Con.*

heir. Cited, to prove no champerty or maintenance, 4 Bl. Com. 134, 135; 2 Chit. C. L. 233; Haw. P. C. B. 1 Ch. 83, s. 1, 13, 17, 18, 21, 22; 8 Johns. 220–479, 1 Phil. Evid. 355, Second Am. Ed.; 2 Roll. Abr.; Bro. Abr. Maintenance, Pl. 7, 14, 17; 15 Vin. Maintenance H.; 2 Inst. 563–4. Cited to prove champerty, &c. 2 Johns. Cases, 382; 18 Johns. Beckman *v.* Frost; 1 N. York R. L. 178, s. 1; 8 Johns. R. 479, Jackson *v.* Ketcham; West, 1 ch. 25, 28, 29; 28 Ed. 1 ch. 11; 8 Johns. 220; 2 Bl. Com. 18; 1 Haw. B. 1 ch. 84, s. 19; 1 Hawk. ch. 83, s. 20; 15 Vin. 162, Pl. 9; 2 Bl. Com. 208; Br. Maintenance, Pl. 18, p. 74; 4 D. & E. 340, Master *v.* Miller; 2 Johns. Cas. 58; 5 Johns. R. 327; 3 D. & E. 454; 4 do. 468; 3 B. & P. 35. By the chancellor, Inst. book 1, tit. 16; Code, book 2, tit. 59; Dig., book 5, tit. 1, 79; Inst. book 4, tit. 1, 33; Huber, 457; Wood's Civil Law, 341; Co. L. 114; 4 Bl. Com. 135; 1 Leon, 167; 32 H. 8; 4 D. & E. 340.

6 Cowen, 431–438, Burt *v.* Place.

An agreement to aid in defending a suit, with one who is not licensed as attorney or counsel, is illegal and void for maintenance.

5 Pick. 348, Brinly *v.* Whiting.

A conveyance by a disseisee is unlawful and void, but the title remains in the grantor; hence, in a writ of entry, the tenant cannot plead the demandant, after the disseisin made such an unlawful conveyance, and that the action is brought at the expense and for the use of the grantee, in pursuance of an unlawful agreement between him and the grantor.

CHAPTER CCIII.

CHEATINGS, &c.

Art. 2. *Con.*

§ 2. To constitute a cheat or fraud indictable at common law, it must be an act that affects the public. Such a deception as common prudence cannot guard against; as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat: 2. Where A pretended he had money in his pocket ready to pay his debt, whereby he obtained a receipt in full in discharge of his debt, and then went off without paying it, held, not indictable, there being only a false *assertion;* but when a person gets goods, &c. *by false pretences*, he is indictable on the statute sess. 13, ch. 29, s. 13. So this act introduced a new rule of law.

The People *v.* Babcock, 7 Johns. Ch. R. 201.

12 Johns. 292; 14 do. 371, People *v.* Miller.

Art. 7. *Con.*

§ 9. This was an indictment on statute 1815, ch. 136, for obtaining money by false pretences. The indictment alleged the deft. did knowingly and designedly, with intent to cheat and

defraud one Edward Hammond, get into his possession from Hammond, fifteen dollars of his property, by the following false pretences and tokens, viz.: 1. That his name was H. Cleutt: 2. That he was agent for the managers of the Maryland Grand State Lottery: 3. That the quarters of tickets which the defr. offered to Hammond, signed H. Cleutt, were genuine quarters of tickets, corresponding with the numbers in quarters, deposited in a bank in Boston. Held, the deft's. assuming a false name, and delivering spurious quarters of lottery tickets to Hammond for sale on commission, with a declaration the deft. had in a bank the genuine corresponding whole tickets, were false pretences within the said act: 2. Held, also, those facts were sufficient evidence of an intent to defraud Hammond. 4 Pick. 177—178, Commonwealth v. Wilgers.

CHAPTER CCIV.

COMPOUNDING INFORMATIONS, &c.

ART. 1. Con.

§ 2. On an indictment against the deft. for compounding a felony; taking the deft's. note for one hundred dollars, as a consideration for not prosecuting the larceny. Held, this was sufficient to constitute the compounding of a felony. The note was not paid, and the promissor's executor refused to pay it, hence it was objected by Pease's counsel that there was no valuable consideration for the supposed compounding of the felony, and that the facts alleged and proved did not constitute the offence anciently called *theft bote*. The chief justice observed Judge Blackstone said, '*theft bote* is when the party robbed, not only knows the felon, but also takes his goods again, *or other amends* upon agreement not to prosecute.' The chief justice thought that the taking the note satisfied the terms '*other amends*.' For the deft. it was said the note was not, because void in law, nothing might ever be received. The court thought there was no reason for this nice construction of the words. The note, though voidable, was in fact of value to the holder, until it was avoided, that it might never be disputed. Indeed it would be hazardous ever to dispute it; for then the promisee would be released from his engagement, not to prosecute. Further the gist of the offence, is the concealment of the crime, and abstaining from prosecution, to the detriment of the public. 16 Mass. R. 91–94, Commonwealth v. Pease.

ART. 3. Con.

§ 3. The indictment charged the defts. with conspiring *falsely* to indict A B, with intent to extort money, and the jury found them guilty of conspiring to indict with that intent, but not *falsely*. Held, that enough of the indictment was found to enable the court to give judgment. The King *v.* Hollingsberry and others. 4 Barn. & Cres. 329.

Vol. VII. Ch. 204. *Art.* 3. *Con.*

In many of our States, conspiracy is punished by statute law—as

In Rhode Island, by fine not exceeding $500, and imprisonment not exceeding six months, common barratry, and embracing the same.

In New Jersey. Conspiracy to indict any person, or to cause him to be indicted; fine not exceeding $500, or by law of 1824, solitary confinement, not exceeding six months, or both, &c. however in most of the States, this offence is punished by common law.

Art. 4. *Con.*

§ 5. *In Pennsylvania*, a conspiracy to defraud by means of false pretences, &c. is punishable with hard labour under the acts of April 5, 1790, and April 4, 1807. And an indictment charging a conspiracy to defraud by means of false pretences, and false, illegal, and unauthorized writing, in the form and similitude of bank notes, which were of no value, and purported to have been promissory notes, and to have been signed, &c. and stating the overt act to consist in passing a note, purporting to be a bank note, and to have been signed, &c. is good. It is not necessary in such case, to charge, in the indictment, the actual defrauding of any person. It is enough the act be said to have been done for the *purpose* of defrauding. Proof of any overt act by one in pursuance of a conspiracy by several, is sufficient to convict all concerned. id.

3 Serg. & R. 220, Collins & al. v. Commonwealth.

Art. 6. *Con.*

§ 9. New York act of Nov. 5, 1816, declaring, that any person convicted of challenging another to fight a duel, &c. 'shall be incapable of holding, or being elected to, any post of profit, trust, or emolument, civil or military, under the State,' is constitutional; and a conviction and judgment of disqualification under this act, are legal and valid. Barker *v.* the People, 20 Johns. R. 457, affirmed in the court of errors. 3 Cowen, 686–709.

§ 10. A challenge to fight in another State, delivered in *South* Carolina, is within the act against duelling: 2. Where the deft. had referred A to the bearer of a letter, as a person authorized to make arrangements in respect to the subject of the letter, which contained expressions equivalent to a challenge. Held, that evidence of conversations between A and the bearer of the letter, was admissible.

State *v.* Taylor, 1 Const. Rep. 107.

§ 11. The principal who sends a challenge, or fights a duel, is embraced in the act of 1812: 2. The declarations of the second are admissible against the principal: 3. The penalty of the act, which prohibits the offender from holding any office of honor, &c. does not constitute a part of the sentence to be passed on the person convicted.

State *v.* Dupont, 2 Mc Cord, 334.

This crime, duelling, is punished in most of the States, by statute law—further, as

In Vermont, killing a person in a duel is death. Sending or

accepting a challenge to fight a duel is fine not exceeding $1000 nor less than $50, and perpetual exclusion from offices of honor or profit in the State. Vol. VII. Ch. 204. Art. 6. Con.

In Rhode Island, though death does not ensue, carried publicly in a cart to the gallows, with a rope about his neck, and setting thereon one hour, and to be imprisoned not longer than one year, or either, or both.

In New Jersey, duelling, giving or accepting a challenge, carrying or delivering such challenge, engaging in and fighting a duel, or being a second, whether the duel takes place or not, or shall be any way concerned in aiding or encouraging, fine $1000, imprisonment three months, and forever disqualified holding any office in the State.

In Maryland, killing an antagonist or wounding him in a duel, so that he shall die thereof within a year and a day, and aiding and abetting, penitentiary, not less than five nor more than eighteen years.

Art. 11. *Con.*

§ 9. Extortion by a justice of the peace. A deft., summoned, appeared before the justice two hours; plt. did not appear, when the justice told the deft. he must tax the plt. with costs; deft. departed; afterwards the justice adjourned the cause to another day, and gave judgment, as on the summons, for $3 or $4 costs. The deft. paid to the justice the amount of the note sued, and the justice demanded the costs, which the deft. refused to pay in full, but paid twelve and a half cents to the justice. Held, this was the extortion in the justice, for which he was indictable and punishable, criminally: 2. The motives of the justice, as whether corrupt, or whether he acted through a mistake of the law, were proper questions for the jury. Extortion, defined, not necessary to state in the indictment the justice took the money as fees, or to his own use, he took it for his judgment. The People v. Whaley, 6 Cowen, 661—664.

Art. 12. *Con.*

§ 1 *con.* The possession of my tenant at will, is not my possession so as to enable me to maintain forcible entry and detainer against a stranger for expelling my tenant at will. And where a writ of restitution has been executed and the proceedings quashed on *certiorari*, the supreme judicial court has power to award a writ of restitution. Not necessary in the indictment, to allege seisin in the *locus in quo*. Is part of the common law of Maine. Forcible entry into a dwellinghouse, is indictable at common law, though the force is alleged to be *vi et armis* only in the formal manner. See ch. 11, a. 9, the authorities. 1 Greenl. 22–27. 5 Pick. 2, ch. 7. 3 Pick. R. 34, Commonw'lth. v. Bigelow.

§ 3 *con.* Forcible entry and forcible detainer, are distinct offences. Deft. may be convicted of one and acquitted of the other, though charged in the same indictment; so if one be set out defectively, and the other correctly, on this he may

Vol. VII. Ch. 204. *Art.* 12. *Con.*

be convicted: 2. There may be a forcible detainer, though the entry be peaceable; and it is sufficient if it appears on the indictment, that the aggrieved party was forcibly kept out of possession. On this subject the English statutes are generally adopted in practice, or enacted in substance, in the several States. Commonwealth *v.* Rogers, 1 Serg. & R. 124.

Burt v. State, 2 Const. Rep. 489.

§ 25. From the evidence of forcible *detainer*, the jury may find the deft. guilty of forcible entry. Though the entry may have been surreptitiously obtained, yet if continued with force, it will be regarded as forcible. State *v.* Burt, id.

§ 26. Justices of the peace in South Carolina have jurisdiction, in cases of forcible entry and detainer, grounded on British statutes, expressly, made of force in that State. State *v.* Huntington, Const. Rep. Tr. Ed. 315; see statutes made in force there in 1712, ch. 196.

§ 27. An indictment lies for a forcible entry and detainer, against a third person who intrudes himself on the land, or enters after judgment against a former intruder; and the sheriff, who has the writ of restitution, may lawfully turn him out

2 Bay, 355.

of possession, as well as he might have done the original intruder, had he found him in possession of the premises.

§ 28. When a person against whom an indictment has been found for a forcible entry, traverses the force, a writ of restitution will not be granted till the question of force is tried; but the deft. will not, as a matter of course, be allowed a term,

2 Nott & McCord, 121.

as in other misdemeanors. Though these cases in Carolina were decided on British statute, there expressly adopted, yet they apply, generally, in the other States, because in them, generally, they have so adopted those statutes, or in practice, or have enacted them into American statutes, *verbatim*, or always in *substance*, where not *verbatim*.

Art. 14. *Con.*

§ 16 *con.* See an important case of this kind, ch. 218, a. 2, s. 26 *con.*, of Ravara, the consul of Genoa, indicted and punished at common law, in a federal court.

CHAPTER CCV.

FORSTALLING, ENGROSSING, MONOPOLIES, AND REGRATING.

Art. 6. *Con.*

These branches of the law, however necessary and valuable in themselves, have almost ceased to be put in execution, even in England; of course we find little or nothing of late years on the subject; yet one would think on reading the case of the King *v.* Waddington, before stated, and decided in the nineteenth century, there must every year be occasions for putting these laws in force, in both countries. A case held to

be an offence at common law, in England. In this case, which occupies twentythree pages, in the first volume of East's Reports, it was contended for the deft. that even before the 12 George 3, ch. 71, the facts charged against the deft. never constituted any offence, but if they did, the offences stated in each count, and all other such *ejusdem generis*, were done away by that statute, which went to repeal not merely the particular acts of parliament therein enumerated, but the whole system of laws respecting forestalling, regrating, and engrossing. Also in this case near all the old statutes and decisions on these subjects were cited. The opinion of the court was given at great length, and concluded thus: 'The court, having taken into consideration the nature and extent of the offence, and the time at which it was committed, when a punishment is peculiarly called for, that may operate as an example to prevent others committing the like crime, which so materially concerns all classes of men, at the same time having respect to the imprisonment the deft. has already suffered, do order and adjudge that he pay to the King a fine of £500, and be further imprisoned in the prison of this court for one month, and until that fine is paid.' It was also contended for the deft. that *engrossing* was confined to *victuals*, and that it had formerly been decided that hops were not *victuals*. The court said that decision was made when hops were considered noxious weeds.

CHAPTER CCVI.

GAMING, GAMING HOUSES, &c. IDLERS, &c.

ART. 2. *Con.*

§ 6. The deft. was indicted for keeping and suffering to be kept in a certain yard by him 'actually occupied,' a ninepins alley, for his proper gain, contrary to stat. 1798, ch. 20, s. 2. Evidence a shed kept for playing ninepins contiguous to a passage way between that shed and the deft's. store. The shed was not kept by him; he lived at some distance from it, but by one Covill, who hired it of the deft. and paid him $4 a week for the use of it, and of a room C. lived in. Many persons resorted to the shed to play for money, and paid C. for the use of the bowling alley. Held, the facts did not show an *actual occupying*, within the act. Deft. discharged.

1 Pick. R. 387, Commonw'lth. v. Dean.

1 Barn. & Cres. 272.

§ 7. Held, that keeping a common gaming house, and for lucre and gain, unlawfully causing and procuring divers idle and evil disposed persons to frequent and come to play together at a game at cards, called '*Rouge et Noir*,' and permitting the said idle and evil disposed persons to remain playing at the said game, for divers large and excessive sums of money,

Vol. VII. Ch. 206. *Art.* 2. *Con.*

is an indictable offence at common law: 2. It seems that an indictment would be good, merely charging the deft. with keeping a common gaming house. Rex *v.* Rogier, &c.

§ 8. A still house or distillery, is such an 'out house' as is contemplated by the act of 1816, prohibiting gaming. 2 McCord, 238.

Art. 3. *Con.*

§ 6. *Innkeepers entertaining town's people on Sunday.* Indictment on Mass. statutes, 1791, ch. 58, s. 3, enacting that no innholder, &c., shall entertain any persons, &c., not being travellers, strangers, or lodgers, &c., on the Lord's Day, (Lord's Day act, March 8, 1792,) on penalty 10s. each person so entertained. Deft. was indicted on this clause. Held, the indictment must state the exact number of persons entertained, and negative their being travellers, strangers, or lodgers, according to the well known rules stated ch. 196, a. 3, and authorities there cited, also, 5 Co. 35; 1 Vent. 272–329; 4 Burr. 2455; 2 Chitty's Cr. Laws, 20–26; 3 p. 672; 10 Mod. 335; 1 East's R. 643; 1 Burr. 148; 1 East's P. C. 166; 1 Stra. 637; 2 Ld. Ray. 1410; 2 Hal. P. C. 182; 2 Pick. R. 139, Commonwealth *v.* Maxwell.

2 Nott & Mc Cord, 280-283.

§ 7. A person who sells liquors to a negro without license, may be indicted and convicted under the act of 1784, for retailing without a license, and under the act of 1817, for trading with a negro without a ticket, for the same act of selling.

State *v.* Sonnerkall, 2 Nott & McCord, 280.

§ 8. A person who sells liquor to a negro without license, may be convicted under the act of 1784, for retailing without a license, and under the act of 1817, for trading with a negro without a ticket, both for the same act of selling.

Art. 4. *Con.*

State *v.* Walker, 2 Murph. 229.

§ 2 *con.* The indictment charged that the deft. was a common, gross and notorious drunkard, and that he, on divers days and times, got grossly drunk, without charging the offence was open and exposed to public view, so as to become a nusance. Judgment arrested after a verdict of guilty.

Art. 7. *Con.*

§ 4 *con.* Other offences in inns, &c. Grant prosecuted South, an innholder, to recover the penalty given by the seventeenth section of the act concerning inns and taverns, Rev. Law, 284, for taking more than the legal rate for a breakfast, and Grant filed his demand, and otherwise stated how it arose, and how the penalty was incurred. Held, the state of the demand must set out what the lawful rate was, and what the complainant paid, both omitted. It seems he paid the wife of the innkeeper less than fifty cents; but made out his account and charged him that sum, and caused him to be arrested on a justice's warrant and carried before him, and fined $4, the penalty in the act; also charged costs of suit, $4,24. Judgment reversed in the Supreme court, for the defects stated above. South *v.* Grant, 2 Halsted's Rep. 26–27, A. D. 1823.

CHAPTER CCVII.

LIBELS.

§ 4. Indictment for a libel in a Rhode Island newspaper at Rehoboth in the county of Bristol, in Massachusetts, Feb. 20, 1822. This paper usually circulated in said county, and in it the paper containing the libel was actually received and circulated. Good evidence of publication in that county, like Rex *v.* Burdett, 4 B. & A. 95. 3 Pick. 304-221, Commonwealth *v.* Blanding.

§ 5. The general intendment of the law is that a libel is of a *malicious* character, and it is for the deft. to shew he published it with good motives and justifiable ends, and do this in the manner the law directs. It is immaterial to the character of a libel, *as a public offence*, whether the matter of it be true or false. Also, Clap's case. The provision in the constitution, securing the liberty of the press, was intended to prevent any previous restraints upon publications, and not to affect prosecutions for the abuse of such liberty. As to the truth, see Rex *v.* Wright, ch. 207, a, 2, s. 4; ch. 218, a. 2, s. 15; Lake *v.* King, ch. 43, a. 4, s. 11; a, 7, s. 8, 20; Thorn *v.* Blanchard, ch. 63, a. 7, s. 15, and other cases in this chapter; ch. 63, and ch. 218. Commonwealth *v.* Clap, 4 Mass. R. 168.

§ 6. An indictment for a libel charged the deft. with saying that the prosecutor was 'worse *that* the lowest vagabonds,' and the words proved were 'worse *than* the lowest vagabonds.' A new trial was granted. Walsh *v.* State, 2 Mc Cord, 248.

§ 7. To publish the proceedings of a court of justice is not an indictable offence unless intended, thereby, to publish slanderous charges, and to gratify a malicious purpose, in which case it would be libellous though true. On an indictment for a libel, the truth of the word cannot be given in evidence; and 3 Pick. 304; Mass. Act, March, 1827, how qualified. State *v.* Lehre, 2 Const. Rep. 809—819. p. 809.

§ 7. Indictment for publishing an obscene libel. It is sufficient to give a general description of the libel, and to aver its evil tendency. Several counts; one is good, a general verdict is applied to that. 7.

Mass. Statute, March, 1827, allows the truth to be given in evidence in all prosecutions for libels, but with a *proviso* that such evidence should not be a justification, unless made to appear, on the trial, that the matter charged as libellous, was published with good motives, and for justifiable ends.

VOL. VII. CH. 208. *Art.* 7. *Con.*

CHAPTER CCVIII.

NUSANCE, BONFIRES, &c.

2 N. H. Rep. 22–26, the State *v.* the Town of Hampton.

§ 1. Indictment for not repairing a part of a causeway alleged to be a public highway, across Hampton Marsh. A *nolle prosequi* entered. Held, 1. The legislature has power to permit a turnpike corporation to lay out their road on an ancient highway: 2. If this be done, the town ceases to be *liable to repair* where so laid out, and the legislarure can discontinue a highway.

§ 2. In an indictment for not repairing a highway, it is not necessary to state the termini: 2. The uses of a way twentyseven years, by the inhabitants of a town where it lies, and of adjoining towns, is not sufficient to establish it on the presumption of an ancient laying out or grant: 3. If used by other towns also, than that in which it lies, it is to be described as a public way, not as a private town way: 2 Pick. R. 51 to 64, Commonwealth *v.* the Inhabitants of Newbury: cited 11 East. 376; 5 Taunt. 126; 2 Stra. 1004; 1 H. B. 351: see a. 10, s. 23, ch. 79; 12 Johns. R. 222; 5 Mass R. 130: 8 East. 264; 2 Saund. by Wms. 175; 3 Smith's R. 216; 4 Barn. & Ald. 579; 2 do. 662: 1 Price, 248; 3 Taun. 99; 5 D. & E. 269; 3 East. 294; 1 Bos. & P. 400; 13 Johns. R. 495; 14 Mass. R. 49: mostly as to presuming a grant, &c.

3 Pick. 327–330, Commonwealth *v.* Worcester Turn. Corporation.

§ 3. Indictment for not repairing an ancient highway, included in the turnpike road in Roxbury. Decided, the corporation was bound to repair it, as it took toll therefor, though not all four rods wide; and if the town had repaired, many years, and agreed with the corporation to repair, this was an affair between themselves only. It was located by a committee of the legislature, and accepted by it.

3 Pick. 408–413, Commonwealth *v.* Low.

§ 4. Indictment for a nusance in erecting a fence on an ancient townway in Chelsea. Held, a town may acquire a right of way by grant, and exclusive uninterrupted user by the inhabitants for twenty years *unexplained*, is evidence of a grant; but such way is *a private* way, and a nusance on it is not indictable: 2. A public town way can be established only in the mode prescribed by statute 1788, ch. 67, and a record thereof, cannot, as it seems, be presumed from a user, for any length of time. The town may have a way by grant proved or presumed, but it will be a *private* way, for its inhabitants only, nor will they be bound to repair.

ART. 9. *Con.*

5 Pick. 41, 42, 438.

§ 7. Cases of indictments on the statute 1825, ch. 184. Printers liable, &c.: so a signboard erected before the act was passed, if continued afterwards, is a new advertisement, by which the penalty of the act is incurred. In an information

thereon for advertising lottery tickets, it is not necessary to allege by name, nor on the trial, to prove by name, what kind of lottery tickets the deft. advertised, nor that they were advertised as being for sale within the county in which the information is filed. p. 42. Vol. VII. Ch. 208. *Art.* 9. *Con.*

If the plt., in an action of the case, be charged with intending to sell unwholesome provisions, (meat) he must, to prove an injury to his reputation aver, the deft. stated, the plt. knew the meat to be unwholesome. Art. 11. *Con.* 1 Pick. R. 524—527.

§ 16 *con.* This was an indictment for creating a nuisance by erecting a dam across Connecticut river, between Northampton and South Hadley. Stated, the river there was a public river, &c. Held, 1. Rivers are navigable as far as the tide ebbs and flows, and no farther: 2. In a navigable river, the right of fishing is common to all the subjects, under such restraints as the government may impose: 3. In a river not navigable, the proprietor of the adjoining land has an exclusive right of fishery in front of it, to the thread of the river, except so for as this right has been qualified by legislative regulations. But this right is limited to the making of fish, and does not carry with it a right to prevent the passage of fish to lakes and ponds, to multiply their species: 4. An indictment at common law does not lie for a nusance, in obstructing the passage of fish, by a dam built across a river not navigable, but only on statute law: 5. The public has an easement for passing in boats, &c., in rivers, which, though not classed with navigable rivers, are, in fact, navigable above the flow and ebb of the tide. See Rivers, ch. 68, Nusances, &c. ch, 74, and the cases therein cited. Art. 12. *Con.* 5 Pick. 199—205, Commonwealth v. Chapin.

§ 20 *con.* A court of equity will not correct abuses merely *public*—does not interfere to prevent *public nusances*, unless the party asking its aid, can show some *private* injury is actually sustained, or justly apprehended by him. An *injunction* had issued to prevent digging down a street, which digging the complainant said was to his *private* injury. The supreme court of appeals thought it was not, Decree of *injunction* reversed, and the bill dismissed. 3 Rand, 63-65.

§ 22. *Nusances of necessity.* A person may, 1. Lay wood in a street, in order to carry it into his house, to lie there a reasonable time: 2. So stones, brick, sand, and other materials for building, provided it be done in the most convenient manner: 3. So a merchant, his goods, in order to remove them to his store in suitable time—but not to sell them. An auctioneer is on the same footing at common law. Commonwealth v. Passmore, 1 Serg. & R. 217-219.

§ 23. *Injunction to stay, prevent, and to remove nusances.* Chancery's power to issue them 'is founded on the right to restrain the erection or exercise of that, from which, irreparable damage to individuals, or great public injury would ensue.'

Vol. VII. Ch. 208. *Art.* 12. *Con.*

Eden, 157, cites 3 Atk. 751. A prohibition lay at common law, to restrain public nusances; but to justify this, or an injunction, there must be some special circumstances in the case. Among other nusances in harbours, are mentioned, the straitening of the port by building too far into the water; but this is not, *ipso facto*, a nusance, unless it be a damage to the port and navigation: in these cases, therefore, it is a question of fact to be found by a jury, whether the building be a nusance or not. Where the building is below the high water mark, it is a *purpresture*, but not necessarily a nusance.

1 Mod. 76. 15 East. 594.

Every common trespass is not a foundation for an *injunction*, where only contingent and temporary: but if it continues so long as to become a nusance, the court interferes, and will grant an *injunction*. The ordinary instance of this jurisdiction, is, where the court interferes to restrain a party from building so near the plt's. house, as to darken his windows, when ancient lights: and the act is in violation of some agreement, expressed or implied: nor is every diminution in the value of the property or premises, a ground for chancery to interpose; nor every species of mischief on which an action on the case lies. The ground is some material injury to the neighbour's dwellinghouse, which requires, on equitable principles, chancery to interpose, to prevent, as well as to remedy the evil.

16 Ves. 388; 1 Dick. 277; Eden, 163.

Eden, 164; 1 Dick. 164.

Art. 17. *Con.*

§ 2. Deft. was indicted on Massachusetts statute 1820, ch. 45, s. 1, for peddling goods not of the produce or manufacture of the United States. Held, the government must prove the goods were of foreign produce or manufacture. Commonwealth *v.* Samuel, 2 Pick. R. 103.

CHAPTER CCIX.

PRISONS, BREACH OF, &c.

Art. 4. *Con.*

§ 8. The People *v.* Ross, 12 Johns. 389. Where A, confined in prison, attempts to escape by breaking it, in consequence of which, B, another prisoner escapes, A is guilty of an offence within the 20th section of the act declaring the punishment of crimes.

1 N. R. L. 472, s. 86, ch. 29.

Art. 5. *Con.*

§ 7. Indictment on Massachusetts statute 1788, ch. 65, s. 6, for pound breach, and held, the illegality of the distress cannot be shown in defence, and pound breach, or delivering creatures from the pound, is extended to creatures going at large, and impounded on statute 1799, ch. 61. The town voted, neat cattle should not go at large. The objection was, the eight cows impounded, were turned out of a field by its owner, into the highway, where the field driver and pound keeper took them. Adjudged he took them at large.

5 Pick. 514—518, Commonwealth, *v.* Beale, Jr.

CHAPTER CCX.

PERJURY AND SUBORNATION OF PERJURY.

§ 9. Indictment for *perjury*. Alleged, that on the trial of an indictment against J. H., the deft. wickedly devising and intending to injure and aggrieve the said J. H., and to cause him to be wrongfully convicted, did, at said trial, of the said indictment, appear as a witness, and was then and there sworn, &c., and then and there, *falsely and maliciously gave false testimony* against the said J. H., &c., by falsely deposing, &c., and so the jurors say, that the deft. committed wilful and corrupt perjury. In arrest of judgment, held, this count was bad, for not alleging the deft. *wilfully* or *corruptly* swore *falsely*.

Another count alleged, that at the trial of J. H., he was found guilty, 'by means of false and material testimony of the deft., in the first count mentioned.' That the deft., knowingly, falsely, wilfully, and corruptly, made affidavit, that the evidence given by him at the trial of J. H. was true; 'whereas, it was false in the particulars, in the first count assigned and set forth.' Held, this count was also bad, as it should have averred distinctly, the deft. was sworn as a witness, and deposed to certain facts, at the trial of J. H., instead of leaving it to be taken by intendment. Rule, *nisi* for a new trial, made absolute. Abbot, C. J., 'every definition of perjury is swearing *wilfully* and *corruptly*, that which is false.'

5 Barn. & Cres. 246–250, Rex v. Stevens.

§ 3. In case of piracy, the civil remedy is not merged in the criminal offence, the property of the party robbed is not divested by the piratical capture. So was the law even in the time of Croke and Ventris: and as he may recover his property, it seems he may recover the value of it from the goods of the offender, within reach of the admiralty. Even at common law, such merger was confined to felonies, and by that law, piracy was no felony.

ART. 6. *Con.*

10 Wheat. 473—497, Manrose, &c. v. Almeida and his goods, &c.

§ 1. See index, Slavery; especially ch. 196, a. 8, &c. Indictment under the *slave trade* act of April 20, 1818, ch. 373, was against the owner of the ship. The indictment charged, that the deft., Gooding, being a citizen of the United States, after passing the act, &c. to wit, on ——, at the district of Maryland, did fit out for himself, as owner, in the port of B, within the jurisdiction of the United States, and within the jurisdiction of this court, a certain vessel, called the General Winder, with intent to employ the said vessel, the General Winder, in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the Island of Cuba, in the West Indies, to be sold as slaves, contrary to the true intent and meaning of the act of congress,

ART. 10. *Con.*

Vol. VII. Ch. 210. *Art.* 10. *Con.*

in such case made and provided, to the evil example of others, in like case offending, and against the peace, government, and dignity of the said United States; six other counts. Held, 1. Testimony of the master's declaration being a part of the *res gesta*, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner in the conduct of the guilty enterprize, was admissible in evidence, against the owner, on said indictment: 2. Evidence admissible, the owner authorized, and by his agents, superintended the fitment, without being personally present: 3. Not essential to constitute a fitting out, that every equipment necessary for a slave voyage, or any equipment peculiarly adapted to such voyage, should be taken on board. It is sufficient, if the vessel be actually fitted out with intent to be employed in the slave trade: 4. Not necessary to specify the particulars of the fitting out; enough to lay the offence in the words of the act: 5. Not necessary there be a principal offender, aided by the deft.: all are principals who are concerned: 6. But necessary to aver, the vessel was built, fitted out, &c., or caused to sail, or be sent away, *within the jurisdiction of the United States:* 7. Fitted out, &c., *with intent to employ, &c.:* 8. In criminal proceedings, the *onus probandi* rests on the prosecutor, generally.

United States v. Gooding, 12 Wheat. 460—480; 9 Wheat. 381, 391, 409; 10 Wheat. 66—133, 11 Wheat. 413, Slave Trade cases.

CHAPTER CCXI.

RIOTS, &c.

Art. 1. *Con.*

§ 5. A negro slave may commit a riot with two white persons: 2 Mc Cord, 462: 2. Three, or more persons assembled for the purpose of patrolling, may, by their conduct, be guilty of a riot: nor can a captain of a *beat* company, make himself captain of a patrole: 3. Patrollers may be indicted for a riot, at common law, in beating negroes, *inter alia*, though by the statute, a specific penalty is imposed for the offence of beating negroes.

State v. Cole, &c., 2 Mc Cord, 117.

id.

id.

Art. 3. *Con.*

§ 3. *Revolt in a ship at a foreign port.* This was an indictment for an endeavour to commit a revolt on the high seas, on board the brig Prudent, Ellis, master. The indictment was on 12th section of the act of congress, of April 30, 1790, ch. 9. Held, an offence, though committed in a foreign port: nor is it necessary to prove it committed on the high seas: enough to prove it committed in such port. Cited 3 Wheaton, 387; 5 do. 76–103; 1 Mason's R. 147–443, United States v. Hamilton.

3 Mason, 475, United States Keefe.

Art. 4. *Con.*

§ 11. *Dismissing schoolmasters.* The superintending school committee have no power to dismiss, unless for one of the causes mentioned in the statute of 1821, ch. 117, and this must be by

3 Greenl. 450-453.

writing under their hands, especially assigning the cause of dismissal. Decided in his action, for his salary accrued after his attempted dismission. The third section of the law provides, 'the said committee, shall have power to dismiss any schoolmaster or mistress, who shall be found incapable or unfit, to teach any school, notwithstanding their having procured the requisite certificate.' As this is a power given to one party only, to vacate a contract, it must be strictly pursued. 'The superintending committee, are constituted by the statute, a tribunal, to adjudicate upon the unfitness or incapacity of the master.' Vol. VII. Ch. 211. *Art.* 4. *Con.*

§ 1 *con.* Form of the indictment at the court of common pleas. States the population, &c.; and neglect to support a grammar school, &c., &c. Plea, not guilty,—appeal &c. Held, 1. No person can be lawfully employed as a town schoolmaster, so as to prevent the town's being indictable, unless he *first* produce the evidence of his qualifications required by statute of 1789, ch. 19: 2. To constitute a grammar school on the said statute, it must be duly regulated as to the admission of scholars: 3. The master must be engaged to keep a school of that description; as such a grammar school required to be kept by every town having 200 families or householders, must be kept for the use of all the inhabitants of the town. Art. 5. *Con.* 16 Mass. R. 141–147, Commonwealth v. Inhabitants of Dedham.

§ 6. In New York. Statutes, sess. 35, ch. 24; sess. 37, ch. 192; sess. 42, ch. 152; sess. 45, ch. 256: (April 17, 1822.) By these statutes, the inhabitants of school districts are authorized to meet, have a sworn clerk, and vote a tax on the resident inhabitants of it, for building a school-house, &c., and to choose trustees to assess the sum voted, by assessment on the taxable inhabitants, agreeable to the levy on which the town was taxed the *preceding year*. Cases decided; Robinson *v.* Doge, 18 Johns. R. 351; 13 do. 444; 16 do. 135. The district must, in every case, vote an exact sum, and expressly empower the trustees to assess that sum.

§ 7. A town has no power to alter the limits of a school district, so as to destroy the corporation without its consent, nor so as to annul or impair contracts made with the corporation. 5 Pick. 328.

§ 8. April 1828. See *mandamus*, ch. 186, a. 2. s. 95, points decided: 1. If a person appointed to warn a school district, return he warned the inhabitants, not stating the time or manner of warning, and they meet, and vote to raise a sum of money and this vote is duly certified to the assessors, they are bound to assess the tax, and neither they or the town treasurer can inquire into the regularity of the proceedings antecedent to the meeting: 2. A school district may be assessed on the valuation of property taken in reference to the town taxes, for the same year: 3. If, after a tax has been raised, and assessed on the said 5 Pick. 322–336, Waldron *v.* Lee.

inhabitants, as part of the district, is set off to another district, the inhabitants of such part remain liable to pay such tax, the debt being fixed by the assessment. A man's tax is fixed as a debt, when it is assessed, not when it is voted. By statute 1817, when a great change was made in the capacities of school districts, by that act they were made corporations to sue and be sued, to receive donations, raise monies, &c.: by it, they 'are placed on the same footing, in regard to the objects for which they are erected, as towns, parishes, or other municipal corporations.'

Art. 15. *Prosecution of crimes limited to two and three years.*

§ 1. Limitations as to prosecutions, found in the act of congress of April 30, 1790, s. 32, in these words, viz.: 'that no person or persons shall be prosecuted, tried, or punished for treason, or other capital offences aforesaid, wilful murder and forgery excepted, unless the indictment for the same shall be found by a grand jury, within three years next after the treason or capital offence aforesaid, shall be done or committed: nor shall any person be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same, shall be found, or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid, provided that nothing herein contained, shall extend to any person or persons fleeing from justice.'

§ 2. Military prosecutions limited to two years. See the 88th article in the rules, &c., for governing the armies of the United States, in these words, viz: 'No person shall be *liable* to be tried and punished by a general court martial, for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period.'

§ 3. So offences against the slave acts of congress, must be prosecuted in two years next after committed: see a. 6, this chapter, especially s. 6; and by force of the said act of April 30, 1790, though the slave acts were enacted subsequently.

2 Cranch. 336. § 4. The act of congress of April 30, 1790, limiting the prosecution on penal statutes, extends to penalties created after, as well as before the act.

CHAPTER CCXII.

CRIMES AFFECTING INDIVIDUALS.

§ 2 *con.* However small the part burnt, it is arson. 16 Mass R. 105.

Setting fire to a jail by a prisoner, for the purpose of affecting his escape, is not arson; nor is it wilful burning of an inhabited dwelling house, within the meaning of the first section; ch. 20, sess. 36, though the jail is to be deemed such house within the act. 18 Johns. R. 115, People v. Cotterel.

Arson is severely punished in all the States. In the night time, or being accessary thereto, death, in Maine, in Massachusetts; in Rhode Island, night or day.

In New Hampshire. Arson: solitary imprisonment, not exceeding six months, and labor for life.

In Vermont. Arson: of a dwellinghouse or any other building, or of any stacks of corn, hay or grain, hard labor in the State prison, not exceeding ten years, and fine, not exceeding $1000, or either. Death, for arson, where any person suffers death in consequence, or is injured in his or her body, or members.

In Connecticut. Death: causing the death, or endangering the life of any person. Arson: common case, State prison, not exceeding seven years.

In Pennsylvania. Arson: first offence, imprisonment, not less than one, nor more than ten years; second offence, not more then fifteen years.

In New Jersey. Fine, and hard labor not exceeding fifteen years.

In Delaware. Arson: burning any dwellinghouse, courthouse, or any office in which public records are kept,—death.

In Maryland. Arson: death or penitentiary, not less than five, nor more than twenty years.

In Virginia. Death. See crimes in Virginia at large.

ART. 7. *Con.*

§ 2. 1 Nott & Mc Cord, 583, the State *v.* Ginns, held, to break and enter, by night, a storehouse, in which no one sleeps, and which has no internal communication with the dwellinghouse, and is unconnected with it, except by a fence, is not burglary.

In Maryland. Burglary and accessary before the fact: punishment; restoration of property, or paying the value, and State prison not less than three, nor more than ten years.

In Pennsylvania. First offence, not less than two, nor more than ten years: second offence, not exceeding fifteen years.

In New Jersey. Burglary: fine, and confinement to hard labor, not exceeding ten years.

In Delaware. Burglary: death.

Vol. VII. Ch. 212. Art. 7. Con.

In Connecticut. Confinement in the State prison, not exceeding seven years.

In Rhode Island. Burglary, and accessary before the fact: punishment, death.

In New Hampshire. Burglary, defined as at common law, solitary imprisonment, not exceeding six months, and hard labor for life.

In Vermont. Burglary; State prison, not exceeding fifteen years, and fine, not exceeding $1000, or either.

In Maine, as in Massachusetts.

CHAPTER CCXIII.

FORGERY.

Art. 2. Con.

17 Mass. R. 46—49.

§ 2 *con.* To constitute a forgery of an order for the delivery of goods on statute 1804, c. 120, s. 1, it is not necessary the person, whose name is forged, have goods in the drawer's hands.

2 Greenl. 365–366, case of Ames & al.

Forgery, at common law, may be committed of any writing, which if genuine would operate as the foundation of another's liability. The forgery, in this case, was of selectmen's letter of credit of a person to the amount of $500, so formed, if genuine, as to hold them liable. See Rex *v.* Ward, s. 5, this article.

2 N. H. Rep. 480, Furber *v.* Hilliard.

To prove a bank bill is forged, it is competent to offer the testimony of persons skilful in respect to money and handwriting, and who have seen what has passed as genuine signatures of the president and cashier, though the persons never saw them write.

This offence of forgery is variously defined in the different States and almost invariably punished in State prisons, so far as they exist.

§ 23. 6 Cowen, 72–76, the People *v.* George Peacock. He was convicted of forgery, at a court of oyer and terminer. Facts. May 12, 1826, the brig Rival arrived at New York, with a quantity of coal, consigned to George Peacock—there being two persons of that name, residing in different streets of the city. The consignment was in truth intended, not to the prisoner, but to the other George Peacock, and this was known to the prisoner. He claimed the coal; and went to Mr Masters, the consignee of the ship, and told him the coal belonged to him, the prisoner, he then went to Mr Pell, said he had a quantity of coal, and wanted an advance. Pell made an advance of $150, on the deft's. signing over to him

the permit for the delivery of the coal. In signing, he did not imitate the handwriting of any person, but signed his own proper name in his own handwriting. Held, this was forgery, and not the merely obtaining goods on false pretences. Was urged for the deft., this was so obtaining the goods, under the statute 1 R. L. 410, s. 13.

§ 10. In this case the indictment stated that the deft. on —— at —— had in his possession a certain false, forged, and counterfeited promissory note for the payment of money, which said false, &c. note is to the following purport and effect, to wit, (stating a bank bill, purporting to be issued by the Merchants' Bank in Providence, Rhode Island,) that the deft. on ——, with force and arms at ——, the aforesaid false, &c. note did utter and publish as true to one A B, with intent the said A B, then and there to injure and defraud, the deft. then and there well knowing the same promissory note to be false, &c. against the peace, &c. Held, a good indictment, as the forgery was to the injury of an individual, and that it was not necessary to allege the existence of the bank. The president and cashier being out of the State two witnesses, much used to inspecting their bills, were admitted to prove the one in question counterfeited, though they had never seen the president or cashier write. Partly on Massachusetts act of 1818, c. 110, allowing such evidence as to banks in Massachusetts more than forty miles from the place of trial.

2 Pick. R. 47, Commonw'lth v. Carey.—2 Mass. R. 126.—1 W. Bl. 485.

§ 11. Forging a deed in New York, for lands in Missouri, or in another State, is an offence indictable and punishable under the act to prevent forgery, and declaring the punishment of crimes.

The People v. Flanders, 18 Johns. R. 164.

§ 12. Not forgery to draw an order in these words, 'pay to John Low, or bearer, $1500, in N. Myer's bills or yours,' the order not being for the payment of money or the delivery of goods.

The People v. Farrington, 14 Johns. R. 348.

§ 29. Indictment for forging a promissory note according to 'the purport and effect following, I promise,' &c. instead of 'I promised.' Held, no material variance: 2. The fact of forging a note within a county cannot be inferred from its having been uttered therein.

5 Pick. 279, Commonw'lth v. Parmenter.

§ 24. *Copy, &c. used.* Indictment for a forgery in altering a bank check. Held, 1. It is best to state the tenor of the instrument; and it must be proved as stated: 2. If the instrument be destroyed or suppressed by the prisoner, the tenor may be proved, and the fact of the destruction, &c. being stated in the indictment will excuse not stating the tenor: 3. The proof may be by a copy sworn to or parol evi-

1 Mason, 464-471, United States v. Britton.

dence: 4. A check drawn in Philadelphia, on Boston, in favor of the prisoner then in Philadelphia, and who produced the altered check in Boston, if no evidence it was altered elsewhere, it is *prima facie* evidence it was altered in Massachusetts; that being the first State where it known to be altered: 5. Forgeries under the laws of the United States must be tried in the district where the crime is committed. Verdict guilty. There was no direct evidence by whom, when, or where the check was altered, nor any copy. See Bos. & P. 2; New R. 87–96, Rex *v.* Crocker, and cases cited; 2 East P. C. c. 19, s. 49 and s. 61.

§ 25. A was indicted for forgery of a note of a bank incorporated by the name of 'the president and directors of the Bank of South Carolina;' and the note given in evidence was of a bank incorporated by the name of 'the Bank of South Carolina.' Held, the evidence did not support the indictment: 2. Forgery may be committed in altering the words or figures on a bank note, so as to make it appear to have been given for a larger sum.

State v. Waters, 2 Const. Rep. 669.

§ 26. The deft. was indicted for passing a counterfeit silver dollar knowingly: evidence he had counterfeited other dollars held not to be admissible: 2. In an indictment for passing counterfeit money, knowing it to be counterfeit, must charge it to have been done with intent to defraud the prosecutor or some other person. But 3. If the deft. be indicted for counterfeiting money, evidence he was in possession of instruments for coining is admissible to prove the *scienter*.

State v. Odel, 2 Const. Rep. 758.

State v. Antonio, 2 Const. R. 776.

§ 27. On the act of 1737, the deft. was indicted for stealing bank bills, &c. It must be stated there was a sum certain due on the notes and not paid when the larceny was committed.

State v. Thomas, 2 Mc Cord, 527.

§ 28. Deft. was convicted of having feloniously forged a bond with intent to defraud one J. S. Held, 1. It is a general rule, that, in an indictment for forgery, the instrument forged must be described particularly: 2. But if in the hands of the deft., or lost, or destroyed by him, the indictment may show this excuse and state the instrument in general terms, if it contain enough to show the offence: 3. Dates, sums, and times of payment may be omitted: 4. And parol evidence given of the contents: 5. If the instrument was in the deft's. hands, when he uttered and published it, it is *prima facie* evidence it continues in his control at the time of the trial.

The People v. Kingsley, 2 Cowen, 522–526.

CHAPTER CCXIV.

LARCENY.

§ 10. Larceny of a slave may be committed by another slave, though no force be employed: 2. The act of 1754 makes it felony, (larceny,) without benefit of clergy, 'to inveigle, steal, or carry away any negro or slaves.' This act applies to negroes as well as to white persons. State v. White, 2 Nott & Mc Cord, 174.

§ 11. The jury may convict the deft. of petit larceny, where the property stolen is proved to be of greater value than twelve pence. State v. Bennet, 2 Const. Rep. 693.

§ 14. 1 Pick. R. 375. It is larceny, if a miller receives barilla to grind, fraudulently retains a part of it, and returns a mixture of barilla and plaister of Paris. 2 Pick. 521. Art. 4. *Con.*

§ 15. Under the act of 1736–7, making it felony to steal, 'any warrant, bill, or promissory note for payment of money.' An indictment may be maintained for stealing a bank note of an incorporated bank: 2. And it is not a valid objection to an indictment in such case, that the bank bill is described as a 'promissory note.'

§ 4 *con.* Indictment for robbery. Held, to make the crime capital, within the first section of the act of 1818, c. 124, it is sufficient the party be armed with a dangerous weapon, with intent to kill or maim the party assaulted by him, in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent. Art. 7. *Con.* 17 Mass. R. 359-365, Commonwealth v. Martin.

Robbery. This crime is not generally punished with death in the United States.

In New Hampshire—punishment, solitary imprisonment not exceeding six months, and hard labor for life.

In Vermont—punished as that State punishes burglary.

In Connecticut—State prison not exceeding seven years: for life, if armed with a dangerous weapon.

In Rhode Island—robbery and accessory before the fact, death.

In New Jersey—fine and confinement to hard labor not exceeding fifteen years.

In Pennsylvania—punishment for the first offence, imprisonment not exceeding seven years, nor less than one: second offence, not less than twelve years.

In Maryland—robbery or accessory before the fact, punishment, restoration of the property, or paying the value, and penitentiary not less than three, nor more than ten years.

§ 8. Massachusetts statute, February 8, 1825, c. 51, enacts, that if any cashier, or other officer, or servant, of any Art. 12. *Con.*

Vol. VII. Ch. 214. *Art.* 12. *Con.*

bank, incorporated within this commonwealth, for the purpose of issuing bills or notes, who shall embezzle or fraudulently convert to his own use, or fraudulently take or secrete, with intent to convert to his own use, any money, note, bill, obligation, security, bullion, or effects of, or belonging to such bank, and in its possession, or belonging to any person or persons, or body politic or corporate, and deposited in such bank, shall be deemed, in so doing, to have committed the crime of larceny; and every person so offending, or assisting and aiding therein, being thereof duly convicted in any court of this Commonwealth, having jurisdiction of such offence, shall be punished by solitary imprisonment, in the common gaol, or the State prison, for a period not less than three months, and not exceeding one year, and by confinement afterwards to hard labor in the common gaol, or the State prison, for a period not less than three years, and not exceeding ten years, according to the degree and aggravation of the offence.'

CHAPTER CCXV.

MURDER, MANSLAUGHTER, &c.

Art. 5. *Con.*

§ 22. *North Carolina.* Where the act of 1817 declared that the offence of killing a slave should be considered homicide as at common law. Held, that the murder of a slave was a felony of the same degree as the murder of a freeman, and so ousted of the benefit of clergy by the statute 23 H. 8, ch. 1. 2. The whole intent of the act of 1817, 'to punish the offence of killing a slave,' was to make the killing of a slave, where it is extenuated by legal provocation, *manslaughter*, and to punish it in the same manner as the manslaughter of a free person. The general rule is, that *words* are not, but *blows* are, a sufficient provocation to make homicide manslaughter.

State v. Scott, 1 Ruffin, 24.

State v. Tackett, 1 Hawks, 210.

Even this crime of murder is not in all cases punished with death in the United States.

In Maine, murder, and being accessory thereto before the fact, punishment is death. *So in Massachusetts*, as above.

In New Hampshire—murder, death. So *in Vermont, Rhode Island*, Connecticut, New York, New Jersey. *Pennsylvania* not, in the second degree; but first offence imprisonment not less than four, nor more than twelve years: second offence, that is, of murder in the second degree, imprisonment for life. In Maryland—murder, death, first degree. In Delaware—murder, death. In Virginia—murder in the first

degree, death: in the second degree, penitentiary, not less than five, nor more than eighteen years, as post. Vol. VII. Ch. 215. Art. 6. Con.

§ 6. A. D. 1765, the husband was murdered by the deft. in Maryland, and his widow prosecuted her appeal of murder against the deft., who was found guilty of the murder by a jury and executed. See all the forms, 1 Har. & McH. 227–229, only case of the kind found in America; and this ten years before the revolutionary war.

Defts. in murder, &c. jointly indicted, how tried. Drew and Quinby, so indicted as above, tried separately on account of their challenges. But, 12 Wheat, 480–486, U. States *v.* Marchant and Colson, held, this is not of right, but at the court's discretion. If any right to separate, it is at common law, which the federal courts must recognize and enforce.

§ 7. The act of South Carolina of 1740, to punish the murder of a slave, is not repealed by the act of 1821, taking away the benefit of clergy. State *v.* Taylor, 2 McCord, 483.

§ 8. Where a bill for murder and manslaughter, was thrown out by the grand jury for murder, but found for the manslaughter, the solicitor entered a *nolle prosequi*, intending to present a new bill for *murder*. The court refused to discharge the prisoner, but admitted him to bail. State *v.* Gulden, 2 McCord, 524.

CHAPTER CCXVI.

PER INFORTUNIUM, SE DEFENDENDO.

§ 18. The deft. was indicted for murder in August, 1823. plea not guilty; defence, self-defence. Held, 1. No man has a right to defend his property, (other than his dwelling-house,) against a mere trespasser, by making use of a deadly weapon: 2. Evidence to show the prisoner was in possession of land, and that the deceased was coming to commit a trespass upon it, cannot be received in justification or excuse, of the homicide committed; but so far as it goes to shew the state of feeling of the parties towards each other at the time of the act committed, it may be received: 3. So with the same view, evidence may be given of law suits existing between the parties, but the court will not enter into the investigation of such legal proceedings, to see whether the suits were malicious or not: 4. Nor will the court inquire into the title of the land, on which the act was committed, to see whether it belonged to the prisoner or the deceased: 5. *Parol* evidence of what was sworn before the coroner's inquest, and reduced to writing by him, cannot be received: 6. A conversation of the deceased with a third person, or acts of the deceased which never came to the prisoner's Art. 3. Con. 2 Hals. 220–244, State *v.* Zellers.

Vol. VII. Ch. 316. *Art.* 5. *Con.*

knowledge, cannot be received in evidence. Verdict, manslaughter. Sentence, three years imprisonment in the state prison, at hard labour, and a fine of $1000.

§ 15. Held, a minor under fourteen years of age may be indicted for an assault with intent to commit a rape. The court said, Parker, Chief Justice, dissenting, 'an intention to do an act does not necessarily imply an ability to do it.'

2 Pick. R. 380—382.

§ 16. In rape, the least penetration is sufficient to constitute the crime: 2. The testimony of an infant of seven years of age, corroborated by circumstances, was held sufficient to justify a conviction for a rape. The punishment of this offence has varied very much, at different times and in different places. In 1828, it was punished in Maryland with death, or penitentiary, not less than one, nor more than twentyone years. In Virginia, as post. In Delaware, by death; so in Connecticut; so in Rhode Island, also, accessary before the fact; so in Massachusetts, as above; so in Maine.

State v. Le Blanc, 1 Const. Rep. 354.

In New Hampshire, solitary imprisonment, not less than six months, and hard labour for life.

In Vermont, hard labour in the state prison, not exceeding ten years: and fine not exceeding $1000, or either.

In New Jersey, fine, solitary imprisonment to hard labour, not exceeding fifteen years.

In Pennsylvania, first offence not less than two nor more than twelve years.

Art. 7. *Con.*

§ 2. *Changing venue.* In a capital case, held sufficient for changing the *venue*, that the prisoner swore, he believed, he could not obtain an impartial trial, because a sum of money had been raised by subscription, by some of the citizens of the district, to apprehend him.

State v. Williams, 2 Mc Cord, 382.

CHAPTER CCXVII.

PLEADINGS, WARRANTS OF ARRESTS.

Art. 3. *Con*

§ 16. This was an indictment of assault and battery, and false imprisonment, committed on the body of a negro named Randolph. He was a slave of a Virginian, fled from his owner, and found in Massachusetts, was seized by the administrator of the former owner. One question was if he could be so seized *without a warrant* authorizing his arrest. Held, that by the act of Congress, 2 sess. ch. 7, he might be so seized *without a warrant* in order to take him before a judge. See some parts of this case in another chapter.

2 Pick. Rep. 11-20, Commonwealth v. Griffith.

CHAPTER CCXVIII.

INDICTMENTS.

§ 3 *con.* Held, that an indictment lies at common law for disorderly behaviour in town meetings: 2. An indictment concluding *contra formam statuti*, may be good, if the facts charged amount to an offence at common law, and are not within the purview of any statute. In such case the indictment must be at common law, and *contra formam*, &c. must be viewed as surplusage: 3. To incur the penalty of the stat. of 1785, ch. 75, s. 6, for such behaviour, the offender must persist in it after notice from the moderator, and neglecting to leave the meeting. 16 Mass. R. 385–388, Commonwealth v. Hoxey.

Every offence tending to the general corruption of morals, as exhibiting an obscene picture, though not publicly, but to sundry persons, for money, in the offender's house, is indictable at common law. 2 Serg. & R. 91.

§ 20 *con.* So to cast a dead body into a river without the rites of christian sepulture, is indictable as an offence against common decency. 1 Greenl. 226–228, Kanavan's case. The court said that before the late statute of Massachusetts was enacted, it was an offence at common law, to dig up the bodies of those buried, for dissection.

§ 21 *con.* So it lies for *maliciously, wickedly, and wilfully killing a cow*, the property of another: 2. Generally, acts injurious to private persons, which tend to excite violent resentment, and thus produce disturbance of the peace, are indictable. The People v. Smith, 5 Cowen, 258–260.

§ 26 *con.* Ravara was consul of Genoa, and was indicted for sundry anonymous and threatening letters to extort money. This was an offence at common law merely. The indictment was in a *federal* court, no statute in the case, but the court had jurisdiction of the person under the federal constitution, the deft. being consul. In all the rest the court proceeded to indict, try, convict, and punish, by the common law in force in the State, and if there had been a *State* statute, fixing the penalty, &c. that must have been, it is conceived, made the rule of it. Sect. 34 of the judicial act of congress, Sept. 24, 1789; and if no such statute provision, the common law of the State must have furnished rules of proceeding, but see Burr's cases, A. D. 1807. Each State has its common law.

§ 33. If A be in possession of B's slave, claiming property in him, it is an indictable offence for B to take him *by force*, though the force be not used towards A. So eave-dropping is indictable. 108. 2 Tenn. R. 96.

§ 34. South Carolina. By her new constitution, art. 3, s.

VOL. VII. CH. 218. *Art.* 3. *Con.*

2, all public prosecutions must be by *indictment*, found by a grand jury. Hence there can be no proceeding by *information*. 1 Bay, 267 ; 1 Nott & McCord, 22.

§ 17. A person cannot be indicted under the act of 1788, for 'marking a log.' 1 Const. Rep. 116.

§ 18. Nor does an indictment lie for taking up and removing a corner stone in the boundary line between A and B, with intent to injure and endanger B. State *v.* Burroughs, 2 Hals. 426–428. Cited Rex *v.* Wheatly, &c., proving it a mere private offence.

Art. 5. *Con.*

§ 10. The caption of an indictment must set forth that it was found at a special court, if the fact were so ; but where the caption was defective in this respect, the court gave leave to amend after conviction. State *v.* Williams, 2 McCord, 301.

ART. 7. *Con.*

§ 29. Where an indictment under the act of 1819, charges the passing of counterfeit *bank notes*, of a bank not within the State, it is not good, unless it avers that such a bank exists, as that by which the counterfeit note purports to have been issued. State *v.* Twitly, 2 Hawks, 248. See s. 31.

State *v.* Chandler, 2 Hawks, 439.

§ 30. Where an indictment is on a statute thirty years old, prohibiting offence after a time specified, it is not necessary to allege expressly, the offence was committed after the making of the statute. Otherwise, if the statute be a recent one.

State *v.* Ward, 2 Hawks, 443. 449. State *v.* Reed, 2 Hawks, 45.

§ 31. In an indictment, were the words 'false, forged, and counterfeit promissory note, commonly called a bank note, of $100, on the bank of the State of South Carolina.' Held, that this indictment contained a sufficient averment of the existence of such a bank. And an indictment for the murder of a slave concluding at common law, is good.

§ 32. The indictment must show, expressly, that the county in which the offence was committed, is within the jurisdiction of the court. State *v.* Adams, Martin, 33.

§ 33. An indictment charging the deft. was a common Sabbath breaker and prophaner of the Lord's Day, commonly called Sunday ; and that he, on divers days, being Lord's Days, did keep a certain open shop, and then and there exposed to sale, divers goods, &c., to negroes and others, to the great damage of the good citizens, &c., was held insufficient, and judgment was arrested. State *v.* Brown, 2 Murph. 224.

Brackett *v.* State, 2 Tyler, 295. p. 166. 2 Hals. 261. 5 Serg. & R. 316–317, Jacobs *v.* Commonwealth.

§ 34. Every indictment must state the day, month, and year, in which the offence is alleged to have been committed, and in burglary, the *hour;* and though another day may be shown in evidence, on the trial, yet it must be a day within the term prescribed by the statute of limitations : 2. It is not necessary to insert the words *vi et armis*, where they may be fairly implied from other words in the competent information, or indictment.

§ 4. After a prisoner has pleaded not guilty, and the jury is charged, it is too late to move to plead a *misnomer*: 2. Where there are two or more distinct counts in an indictment, charging different and distinct offences, and punishable differently, a general verdict of guilty is bad. State *v.* Montague, 2 McCord, 287. Vol. VII. Ch. 218. Art. 9. Con.

§ 14. A complaint for a breach of a by-law of Boston, concluding against the form of the by-laws in such case made and provided, is not sufficient, without concluding, also, against the form of the statute. 5 Pick. 44, Commonwealth *v.* Gay. Art. 14. Con.

§ 13 *con.* L. was indicted on the act of congress of July 29, 1813, ch. 34, s. 4 and 9, granting a bounty to vessels employed in the cod fisheries, for making a false declaration. The indictment stated the paper purported the vessel was of the burden of fourteen tons fortyfive ninetyfifths of a ton, the paper produced was fourteen tons fifty ninetyfifths of a ton. Held, the variance was fatal. Art. 15. Con. 2 Mason, 229, U. States *v.* Lehoman.

CHAPTER CCXIX.

INFORMATIONS.

§ 10 *con.* An information amended without the sanction of the attorney general, ordered to be taken off the file, with costs. A bill cannot be dismissed by agreement of the parties, there must be some act of the court to the purpose; an amendment cannot be permitted without the sanction of the attorney general. Art. 1. Con. 1 Jacob & W. 254. p. 345. Attorney General *v.* Fellows.

§ 21. Since the last constitution was adopted in South Carolina, by a. 3, s. 2, there can be no informations in that State; but all prosecutions of offences must be by indictment found by a grand jury. Art. 7. Con.

§ 22. A prisoner cannot be tried in New Jersey on a coroner's inquest, where it finds the deft. guilty of murder, and the grand jury find a bill for manslaughter only, he must be tried on their bill or indictment. State *v.* Powell, 2 Hals. 244.

CHAPTER CCXX.

PLEADINGS IN CRIMINAL CASES.

§ 12. Case of *contempt* in Maryland, of county judges. A, was indicted for murder in the county court of ———, September 20, 1791. The attorney general of the State issued out of the general court office a writ of *certiorari*, direct- Art. 6. Con.

VOL. VII. CH. 220. *Art.* 6. *Con.*

ed to the chief justice and associate justices of said county court, to remove said indictment, &c., returnable, &c., October 1, 1791. These said county justices made return, refusing to allow said *certiorari*, on several grounds, 1. The attorney general had no power in vacation to issue it; and they proceeded to trial. On his motion, the general court summoned the said county justices to show cause why an attachment of contempt should not issue against them for said refusal, &c., and so going to trial. On the return, the chief justice appeared for himself and associates. General court, held, the *certiorari* was legally issued, and them 'guilty of a contempt of the State's process;' therefor an attachment issued; returnable, &c., they appeared; on hearing, chief justice fined 20*s*., and each of the others 20*s*. and costs, &c. This proceeding was at common law, and is applicable to every State, in substance.

3 Har. & M' H. 115—117, State *v.* Stone & al.

Attachment for contempt in disobedience of a decree of the chancery court, lies only for disobedience of what is decreed, not for what may be decreed. 1 Rand. 242–247.

7 Wheat. 38—45, Kearney's Case.

§ 13. He was committed for a contempt, by the circuit court for the district of Columbia. Jones moved the supreme court of the United States for a writ of *habeas corpus* to bring Kearney up. The court held it had power so to do, where a person is imprisoned under a warrant or order of any other court of the United States. But it has no appellate jurisdiction in *criminal* cases; so cannot revise the judgment of the circuit court by writ of error, in any case, where a party has been convicted of a public offence: writ denied. Kearney was in execution on the judgment of a competent court. See 3 Wils. 188, Crosby's Case; Burford's and other cases, in this chapter.

§ 14. A rule for an attachment for not performing an award, will not be granted, there not having been any demand of performance, &c. 1 Cowen, 39–40, Knight *v.* Carey & al. Many cases cited, all English.

ART. 7. *Con.*

§ 11. No process of outlawry in *civil* causes in Pennsylvania. 1 Serg. & R. 36.

ART. 12. *Con.*

§ 2. Process of outlawry found in this chapter, articles 7 to 12, is so little in use in modern practice, that it is scarcely ever to be found in any late reports or statutes.

CHAPTER CCXXI.

PLEADINGS IN CRIMINAL CASES.

ART. 6. *Con.*

§ 6. Further authorities. 6 Cowen, 555–568. If a juror, before trial, express an opinion, it is cause of challenge, and

cases cited; as Durell v. Mosker, 8 John. 445, &c.; Pringle v. Huse, 1 Cowen, 432; Burr's Trial, vol. 1, 370–419, &c.

§ 14. Challenge, because the juror had given opinion after summoned as a juror. A large portion of the doctrine of challenge to jurors, in New York, is found collected from English and American authorities, both in criminal and civil cases. 1 Cowen, 432–442. Notes, p. 436 to 442.

ART. 8. Con.

§ 1. Indictment for assault and battery. Plea a former conviction before a justice of the peace, for the same offence. State replied, obtained by the deft's. fraud; rejoinder and issue on that fact; found against him and adjudged no bar. Little employed the person who filed the complaint before the justice; that person directed the service, and what witnesses to be summoned; and an attorney was paid by Little to appear in behalf of the State, and all the proceedings were conducted under Little's agency. The fraud was an injury to the State, in reducing the fine before the justice. 1 N. H. Rep. 257–259, The State v. Little.

Several persons are convicted of a misdemeanor, a new trial cannot be moved, unless they are all present in court, and it is not a sufficient excuse for absence, that they are in custody on civil process. 4 Barn. & Cres. 329.

§ 4. Notwithstanding the act of 1741, a slave tried for a capital crime, may be convicted on the testimony of a slave, uncorroborated by pregnant circumstances. State v. Ben, 1 Hawks, 434.

§ 5. *One convicted of larceny, &c.* The owner of a slave, by his agent, assents the defts. may take him away; but in order to apprehend the felons; they in so doing are not guilty of larceny or seduction, under the act of 1779. But where the defts. bring a slave to a particular place, after such assent, but in pursuance of a plan matured before the assent given, if the jury are satisfied that both defts. were privy to the felony, and equally concerned, they may properly convict them. State v. Barne, &c., 2 Taylor, 44.

§ 6. Under the act of 1740, the payment of *one fine* is not sufficient, where several have been indicted and convicted of killing a slave on sudden heat and passions; but every one convicted is severally liable for the whole. State v. Smith, 1 Nott & Mc Cord, 182.

§ 7. To convict A of a second crime of petty larceny, he must commit it after convicted of the first. This is the true construction of the statute, (sess. 42, ch. 246, s. 40,) providing that every person who shall be a second time duly convicted of petty larceny, shall be adjudged to imprisonment in the State prison. Statutes extended to other felonies the same way, that is, 'convicted or attainted of any of the said felonies committed after the said first conviction,' act of March 26, 1796. Some other acts are different; but the court seemed to think they all ought to have the same construction; that is, The People v. Butler, 3 Cowen, 347—352.

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in order to inflict the greater punishment on the second offence, it must be committed after the conviction of the first. The court said, 'we think the difference of phraseology in these several statutes was merely accidental; that the legislature meant the same thing in each, which is, that the conviction shall precede the second offence. The reasonable construction is given by Hawkins.' (C. P. ch. 40, s. 3.) 'Where the rule is laid down thus: when a statute makes a second offence felony, or subjects it to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; for the gentler method shall first be tried, which perhaps may prove effectual.'

ART. 10. *Con.* 8 Wheat. 312-325, Bud *v.* Van Ness.

§ 2 *con.* Error to the supreme court of Vermont, being the highest court of law in that State, also on 25th section of the judiciary act of Sept. 24, 1789, ch. 20. Held, 1. The appellate jurisdiction of the supreme court of the United States may be exercised by a writ of error issued by the clerk of the circuit court under the seal of that court in the form prescribed by the act of congress of May 1, 1792, ch. 187, s. 9, and the writ itself need not state that it is directed to a *final* judgment of the State court, or that the court is the *highest* court of law or equity of the State: 2. This jurisdiction arises under the constitution laws and treaties of the Union, and is not limited by the value of the matters in dispute: 3. This jurisdiction extends to a case where both parties claim a right or title under the same act of congress, and the decision is against the right or title claimed by either party under such acts.

ART. 17. *Con.* 1 Nott. & Mc Cord, 547-554, the State *v.* Haywood.

§ 7 *con.* Indictment for perjury. Held, two witnesses are not necessary to disprove the facts sworn to by the deft. But where there is but one witness in addition to his testimony, some other independent evidence ought to be produced: 2. Where there has been a conviction for perjury, and the words stated in the indictment from the face of it, do not appear to be material, by averment, or by the context of the indictment, or by their own import, judgment will be arrested.

1 McCord, 582.

Where A is indicted for a riot committed by him and four others, the others must be named or said to be unknown; if not so the judgment must be arrested.

§ 14. *Convict, additional punishment, &c.* 5 Pick. 420, Commonwealth *v.* Keniston. Oct. 6, 1825, he was sentenced to solitary confinement for ten days, and hard labour two years in the State prison, and the same day was removed thither. Oct. 16, 1827, the first day of the term, the solicitor general filed an information stating a former conviction and sentence to hard labour for another offence, and praying that an additional punishment might be awarded pursuant to stat. 1817, ch. 176. Curia,

we think the information should be filed before the prisoner's term of punishment has expired, the day of commitment is to be reckoned a part of term. Hence this expired the 15th of Oct. 1827. Prisoner discharged. Vol. VII. Ch. 221. Art. 18. Con.

Here at the close of *criminal* law, designating the offences and the various kinds of punishments thereof, the proceedings, &c. so far as collected in this work, under their respective heads; as Arson, Burglary, Conspiracy, Duelling, Larceny, Murder, Robbery, &c., and having noticed the criminal laws of Massachusetts, so, principally, those of Maine, quite at large, it may now be useful to bring into one view, the principal crimes in some other States and the punishments thereof, as in chapters 197 to 221, both included. Crimes and offences, and their penalties, and judicial proceedings in most of the States, have, in part, been considered, it is believed, that adding the principal crimes and offences in *Virginia*, as in 1828, and the punishments and penalties annexed thereto, and selecting some more cases from other States, as much criminal law will be contained in this Abridgment, as is suitable to the nature of the work, though so large a one.

§ 1. Virginia, the principal crimes, &c. follow.

Treason, (against the State must be meant,) punishment, death by hanging.

Slaves conspiring to rebel, or to murder any free person, death.

Murder in the first degree, punishment, death.

Killing a person in a duel is deemed murder, and death the punishment.

Rape by a slave, or if one carnally know or abuse a female, child under ten years of age, punishment is death, so

Buggery by a slave, with man or beast, same punishment. See these crimes committed by free persons, in subsequent pages.

Arson, punishment, death for all, and if a slave be accessary to arson, his punishment is death.

Wilfully setting fire to a house in a town by night or by day, the punishment is death.

Slaves wilfully burning any barn, stable, shop, cornhouse, &c., death.

If a slave break any warehouse, storehouse, and take money, goods, or chattels, the punishment is death. We shall see, in subsequent pages, slaves are punished with death in nine other cases. So free persons committing crimes after they have been imprisoned for life.

A free person advising or conspiring with a slave in rebellion or murder, death is the punishment.

Punishments in the penitentiary, as stealing or selling a free

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person for a slave, penitentiary, not less than one, nor more than ten, years.

Stealing a slave, penitentiary, not less than three, nor more than eight, years.

Murder of second degree, penitentiary, not less than five, nor more than eighteen, years.

Robbery, or accessary before the fact, restoration, or payment, penitentiary, not less than five, nor more than ten, years.

Burglary, punished as robbery.

Manslaughter, penitentiary, not less than two, nor more than ten, years, and to give bonds.

Maiming, by cutting out the tongue, putting out the eye, &c. &c., and aiding therein, penitentiary, not less than two, nor more than ten years, and fine not exceeding $1000.

Challenging, to a duel, or accepting a challenge, forever disqualifies for office.

Rape as accessary, penitentiary, not less than ten, nor more than twentyone, years. Free persons.

Carnally knowing or abusing a female child under ten years of age, or accessary before the fact, penitentiary, not less than one nor more than ten, years. Free persons.

A slave attempting to ravish a white woman, punishment, castration.

Buggery with man or beast, penitentiary, not less than one, nor more than ten, years; means by a white person. See slave above.

Accessary to arson, if a free person, penitentiary, not less than ten, nor more than twentyone years.

Maliciously setting fire to any barn, shop, stable, stack of wheat, corn, &c. by night or day, aiding and abetting, to pay all damages, and penitentiary or jail, not less than two, nor more than five, years.

Wilfully burning a house, or houses other than those before enumerated, either by night or day, penitentiary, not less than one, nor more than ten, years.

Felonious breaking any warehouse or storehouse, and taking any money, goods, &c., or aiding and abetting, penitentiary, not less than one, nor more than ten, years; free persons.

Keeping a Faro Bank, E. O. table, &c. or suffering them to be used on the premises of an innholder, penitentiary, not less one, nor more than two years, and fine not exceeding $500.

Forcible abduction and marriage, penitentiary, not less than two, nor more than ten, years.

Unlawfully taking away from parent or guardian any female under ten years, imprisonment, not more than two years; and taking away and deflowering any maid or woman child, imprisonment for five years.

Perjury and subornation of perjury, fine not exceeding $1000, imprisonment one year; forfeiture of any office of honor or profit which he may hold, and forever incapable of holding any office in the State.

Juror accepting a bribe, fine not less than ten times the amount or value of the bribe taken, imprisonment six months, and to be subject to the same disabilities as in cases of perjury.

Embracery, or procuring a juror to accept a bribe, fine as in the case of a juror, imprisonment, twelve months, and the same disabilities.

Forgery of current coin or bank notes, or aiding in such forgery with intent to injure or defraud, or passing or offering to pass such counterfeit coin or bank notes, with intent to defraud, penitentiary, not less than ten, nor more than twenty, years.

Forging or procuring to be forged, or keeping or concealing any instrument for the purpose of forging coin, bank notes, &c. or the seal of any banking company, or any public official seal, when against a banking company, penitentiary, not less than five, nor more than fifteen years; when in relation to any other public seal, penitentiary, not less than one, nor more than ten, years.

Forging of any check, post note, or order on any bank, &c. or obtaining, or attempting to obtain, any monies, &c. by means of such forged check, post note, or order, or aiding therein, penitentiary, not less than two, nor more than ten, years.

Forgery of any land warrant, or other warrant, issued by the State, or United States, or any bill of credit, record, deed, will, note, bond, &c., penitentiary, not less than one, nor more than ten, years.

Forging or counterfeiting the brand or mark of any inspector of tobacco, or exporting tobacco, with such forged brand or mark, with intent to defraud, penitentiary, not less than one, nor more than ten, years. The same penalty for voluntarily destroying or concealing any codicil, or will, or aiding therein.

A slave committing any of the above forgeries, &c., punishment death.

Obtaining money or goods by false tokens, imprisonment, not exceeding one year, and setting in the pillory.

Horse stealing, or accessary, penitentiary, not less than five, nor more than ten, years. If by a slave, death.

Buyer or receiver of stolen horses, knowing them to be such, and accessaries, penitentiary, not less than six months, nor more than four years. If a slave, death.

Embezzling, or stealing, or taking away any record, writ, return, process, warrant, &c. of any court, penitentiary, not less than one, nor more than ten, years. If by a slave, punishment, death.

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Grand larceny, or when the value of property exceeds $10, restoration of the goods or payment of the value, and penitentiary, not less than one, nor more than three, years.

Petit larceny, or under $10, first offence, restoration or payment, and confinement in the county jail, not less than one, nor more than six months, and fed on low, coarse diet, as convicts are fed in the penitentiary, and punished by stripes, at the discretion of the court, to be inflicted at one time, or different times, not exceeding thirtynine at any one time.

Petit larceny, second offence, penitentiary, not less than five, nor more than ten, years.

Persons having been once sentenced to the penitentiary for an offence, if afterwards convicted of any other offence, of which, being convicted, would subject them to confinement in the penitentiary for a term not less than five years, the punishment is imprisonment for life.

Any person, after having been tried before convicted, and sentenced to the penitentiary, who shall be a third time convicted and sentenced, imprisonment for life.

By a law enacted in March, 1824, persons convicted of offences, which, by any existing law, would subject them to imprisonment in the penitentiary for life, are to be punished with death by hanging. Persons sentenced to the penitentiary, are by law to suffer solitary confinement for a term of time, not less than one eighth, nor more than one half of the term of sentence; this confinement to be at convenient intervals of time, reserving always three months to be inflicted immediately preceding discharge. But the superintendent may, if the physician *shall* judge the health of the convict require it, remove any convict from the solitary cell.

Wilfully setting fire to, or burning any bridge, of the value of $100, penitentiary, not less than two, nor more than ten, years. If a slave, death.

Destruction or wilful injury of a canal, and its appurtenances, penitentiary, not less than two, nor more than ten, years.

Adultery, fine $20. Fornication, fine $10.

Riot, imprisonment and fine, as determined by a jury before whom it may be tried.

Conspiracy to procure an indictment against another, imprisonment and fine, at the discretion of the jury.

Moving suits at law, or procuring them to be moved, &c., same as the foregoing.

See a good collection of criminal laws in other States, made in 1829, by the Prison Discipline Society.

§ 2. *Remarks.* Those who observe the punishments which were inflicted in England, when our ancestors left that country, and those inflicted in our colonies, many of which are noticed in said chapters 197 to 221, may see that punishments have not

only been varied, but much, also, mitigated, that a spirit of humanity and refinement has been constantly but gradually increasing.

As this course is all in favour of the vicious and the criminal, and tends to render the virtuous part of society less secure, it becomes a serious question if the mitigating course has not been carried far enough in the United States.

It will be observed that but few crimes are now punished with *death*, or even confinement for life; but near all criminals, however great, are in time let loose on society; though some of the state prisons and penitentiaries, may, in some degree, reform the offenders confined in them, others, as yet, are only schools of vice and crimes; in them they learn to boast of their feats, and how to grow more criminal, more hardened in iniquity, and better taught to practise it. Good feelings and compassion, as in the tender minds of women and children, often acts suddenly, and on very limited views of cases. They see those punished, and often decide before they reflect on the necessity of public security, the *reasonableness* and necessity of securing the lives, persons, and rights of all, and of the virtuous and best part of human society.

§ 3. In the several States, (except Louisiana,) there is nearly the same list of crimes and offences, taken, originally, from the same source, the English law, (except, also, as to slavery,) usually called by the same names; that is, the *same acts*, and the *same injuries*, are designated by the same name or description, taken, originally, from the same English books.

So, generally, the same means of punishment, in principle, are used in each of the States, as punishment by death, by confinement in State prisons, (called by some penitentiary,) part of the time in solitary imprisonment, and the largest part to hard labour, confinement to common or county jails, and pecuniary fines. In Rhode Island, as late as 1822, were preserved setting on the gallows, pillory, whipping, cropping ears and branding; but these five colonial means of punishment, or any of them, are but very little preserved in the other States.

§ 4. Vast variety in applying fines and imprisonments in the several States. As to punishment by *death* in each of the States, this is the punishment—(omitting accessaries, slaves, and offences after the first,) in ten cases in New Jersey, or may be; in eight cases in Massachusetts, including killing in duels; in Rhode Island and Delaware, in seven cases each; in Maryland, *may be* in seven cases; in Maine, is in six cases; in Vermont, in five, and in Virginia, in five cases of free persons; in New Hampshire, in two cases; and in Pennsylvania, only in one case, that is, murder in the first degree. In the other States, between the extremes of ten and one. As to persons confined in prisons, may be from a day to the term of life. As to fines, from

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one dollar to many thousands. Instance, the imprisonment in either the State prisons or common jails, is generally sentenced to be not exceeding so many years, months, or days; the fine not exceeding so many dollars, but in a few cases only does the law say not less than such time or sum; fines, &c., in Rhode Island, for *blasphemy*, fine not exceeding $100, imprisonment not exceeding two months; *adultery*, fine not exceeding $200, imprisonment not exceeding six months; *fornication*, fine not exceeding $5, imprisonment not exceeding five days, under which law the court may award a cent or an hour, and obey the law. In this way the statute law in each State, generally fixes the time of the convict's imprisonment, and the amount of his fine. In a few cases in Virginia, &c., the jury assess it; but in most cases a vast discretion is left in the judges, below the time or sum prescribed by statutes. In a few cases, the fine is not less than so many dollars, leaving the judges to fine as much above as they see fit. On looking over the criminal codes of the several States, it seems legislators have exerted fancy and ingenuity in varying fines from one dollar each case, to many thousands each. So imprisonments from one day to term of life. In a few cases, statutes give damages; in a few, double and treble damages to the party injured, often restore to him his property stolen or taken from him; in a few cases disqualify for office, a longer or shorter time; in a few cases, bonds to keep the peace and be of the good behaviour are required; in a few cases, the convict is disqualified to be a witness. Sometimes, where the statute annexes to the same offences several punishments, the judges may inflict one or more of them. Also, statutes vary very much, punishments of second and third, &c. offences. In a few cases, the offender may be sold in service. Thus we have a view of our criminal laws, sometimes general, sometimes in detail. But such is the vast variety in detail in twentyfour States in the Union and Territories, that an octavo volume would not contain concise descriptions of all the offences in them, by statute and common law, and the thousands of penalties and punishments annexed to them, this burdensome detail grows out of our peculiar system in part, but mainly, the practice of so many legislatures, perpetually, and often unnecessarily diverging from each other.

CHAPTER CCXXII.

IMPEACHMENTS.

Art. 20. Con.

In August, 1827, at Gloucester, in England, in addressing the grand jury, Baron Vaughan observed, 'it would be highly improper for a judge of the law to mix himself in any way with questions of politics, and I feel that I should be polluting the

seat of justice by so doing.' Probably this may be considered as one of the causes that there is so much and universal confidence placed in the judges of England, where ardent, if not heated, political contests, are so incessant. What would have been the effect if Judge Chase, whose case occupies so much of this chapter, had been as prudent as Judge Vaughan?

CHAPTER CCXXIII.

TITLES, UNDER STATUTES, TO PROPERTY IN THE SEVERAL STATES IN THE UNION.

ART. 1. *Con.*

§ 7 As to the laws of descent and distribution of intestate property, it may be proper to add, in order to show briefly how they *agree* and how they *differ* in the individual States. They no doubt differ much more than any other laws in them. These *descent* laws and the judicial decisions on them, *in extenso*, are sufficient to make many volumes. Yet we may safely affirm that near the whole of this massy variety is unimportant and is, in many cases, merely the production of fancy—a variety rarely material, constantly increasing by the repeated revisions of these laws in so many States, and by the numerous decisions thereon made in so many separate States.

First, the States agree in the essential parts of the laws of descent and distribution, whenever real intestate estate in fee or in tail, has been left, in any colony, province, or State, to descend by the rules of the English common law here adopted. This was adopted in each of the thirteen colonies in the first period of its settlement, and before any statute on the subject was enacted. Such statutes were early enacted in Massachusetts, Rhode Island, and Connecticut, later in New Hampshire, and much later in Maine, and generally not until after 1775 in the other nine colonies. In New York and in a few other States, in a few rare cases, this common law still directs the descent of intestate estates.

About one hundred and sixty years since the statute of distribution of the 22d and 23d of Charles II. was enacted in England, by which personal estate intestate has been almost entirely distributed, during this long period. It was formed on principles purely republican, giving the personal estate of the intestate to all his children in equal shares and so to their issue, and on failure thereof, to the brothers and sisters of the intestate alive at his or her death, equally, and to the children of each deceased brother and sister. The children of each taking by *representation per stirpes*, their deceased parent's

share in his or her place; and on failure of these, also, then to the *next of kin* of the intestate, in equal shares, providing also for the intestate's widow specially.

Con.

Early in New England, as to intestate *real* and *personal* estate, and in the others of the thirteen colonies, as to intestate *personal* estate, and at early periods after 1775 as to such *real and personal* estate, this statute has been in force by adoption or reenactment in all the thirteen colonies, since States, in respect to the descendants of the intestate, however remote. As to them from said respective periods, there has been, and now is, in all the colonies and States, in Federal America, (Louisiana excepted,) but one uniform rule, or law of descent and distribution of intestate estates. Every State has reenacted so far the said statute of Charles II., and so far congress in July, 1787, made it unanimously a part of the territorial ordinance, as appears in the third section above. This statute of Charles made no difference between whole and half blood, males and females, father's or mother's side. Also so far has said ordinance and several colonies and States adopted or reenacted said statute of Charles II. Probably nine tenths of all the intestate personal estate in the thirteen colonies, and nine tenths of the real intestate estates in those of New England, and nine tenths of all the intestate real and personal estates in twentythree States, in the last fortythree years, has uniformly descended and been distributed to the issue and descendants of the intestate by the same uniform statute rule. Probably seven eighths of the intestates leave descendants of some discription; and when persons do not leave any issue, they usually leave wills, republican ones or not, as they please.

The States all agree, as to posthumous children of the intestate: viewed as in existence, though in *ventre sa mere*, when he dies. It will be seen in this chapter very near all of them agree in several matters. As to *male* and *female* descendants, see Vermont, New Jersey, and Virginia. There is no such distinction in the said statute of Charles II., said ordinance, or in most of the States, giving males double portions. This is the ancient prejudice in part preserved.

§ 8. The States *differ* in numerous cases, but not in essential ones. Only the most considerable differences can be here noticed, and only the *principles* of differences belong to this article; the *particulars* belong to the other articles in this chapter, in which each State is considered by itself.

The first difference to be noticed is, that of the *whole and half blood*. In making these differences in different States, fancy often seems to have been the guide.

The second difference respects *ancestral* estates, that is, estates coming to the intestate by descent, devise, or by deed of gift from some *kindred*, or *relation*, by blood, of the intestate, and estates he actually purchased and acquired with his own means, this is called *acquired* estate.

The third difference is, when an ancestor, as parent, &c. is degraded, as the mother is by the act of Jam. II., by which she is reduced from the first degree of kindred to her children to the second, so as only to take a share among them when one dies intestate, and the father is dead; whereas a mother in the first degree would, but for this statute, take all.

§ 9. The fourth difference is as to *representation*. By said act of Charles II. it is limited to the children of brothers and sisters of the intestate deceased, before his death. Several States, we shall see, follow that act and others not, but take various courses.

In taking by *representation* or *per stirpes*, it is a general rule, the takers must be in different degrees, as where the intestate leaves a brother in the second degree, and nephews in the third, and children of a deceased brother, B, they take B's share by *representation per stirpes*. Another rule is, if all be in the same degree, who take, they must take *per capita*, each one an equal share, as where all the claimants are brothers, or all are nephews and neices. No representation in the ascending line.

The fifth difference is thus: a few States require the intestate to die *actually seised*, or seised, the same thing, in order the estate may descend from him. Most of the States only require the intestate to be owner of the estate, or to have a right thereto, or interest therein, in order it pass from him. The feudal principle of seisin was in force in most of the colonies till 1776, by which the estate descended from the person *last actually seised*. As if a father died so seised in fee and left a son, his only heir, who died before he got such seisin, the estate descended to the father's heirs, and not his son's.

The sixth difference is as to legitimating children born out of wedlock, by the marriage of their parents *after* they are born, the father recognising them to be his. So is the Scotch law, the French, and many christian laws. So the laws of Maryland, Virginia, and Vermont, Ohio, &c. Others not so.

The seventh difference respects *cousins*. Some States name them as takers specifically, and direct the intestate estate to go to *cousins*, when first, second, third, &c. cousins take in order as long as any can be found. Leaving kindred nearer related to the intestate, even than first cousins, to take

after them, under the words *next of kin*. This is the case in Georgia. Possibly Alabama and Mississippi may follow Georgia.

The eighth difference is in providing for the intestate's widow in many ways, as in the following articles.

Ninth, they differ much as to *advancements*: very various, especially as to the evidence.

Tenth difference is in applying the rule of computing the degrees of kindred. All the States adopt the rule of the *civil law*, except North Carolina, Maryland, and Georgia.

Eleventh difference is as to the wife's conveying her estate. She is examined in all the States, except Maine, New Hampshire, Massachusetts. Generally, where she does not convey legally she dies intestate.

The twelfth difference is as to the crop going to the heir, or executor, &c. Some States divide it, as Rhode Island and several other States, as in the following articles.

The thirteenth difference is as to taking *per stirpes* or *per capita*.

There are some other differences not often made.

It merits particular attention, that the most considerable differences are the relics of *feudal* principles, relics cast by in almost all liberal laws. The distinction of blood, of ancestral and acquired estates, originated in feudal times: both distinctions have ever been rejected in many colonies and States. As to the last, as the intestate becomes complete owner of the property he leaves, and can dispose of it as he pleases, and the property is his, it is of no importance how he comes by it. Of this opinion were the Romans; of it are the French, and many of our States. So the said principle of seisin is feudal: rejected by most of the States. Said legitimation is law but in few States; for its rejection or extension there are high Christian authority. At present the differences as to *cousins* are found only in Georgia. Difference as to wedlock proves there has been no one leading principle. All the States agree in the said rule of the civil law, except three, though some do not name it they calculate upon it. Several States do not examine the wife privily, and never have, and they in two centuries have found no reason to alter. The difference as to the crop are very limited and unimportant. The same may be said respecting the few cases of *per stirpes* and *per capita* in which the States differ.

9 Wheat 565–573.

§ 10. Even a mere equitable title to land, to be located, cannot pass by devise unless the will be proved and registered, according to the laws of the State in which the land is to be located, and if viewed as *personal*, still the law is the

same. See also 9 Cranch, 151, and Goodwin *v.* Jones, ch. 29, n. 1, s. 17.

The title and disposition of real property is governed by the *lex loci*, and title to lands can only pass by devise according to the laws of the State or country where the lands lie: 2. The probate in one State or country is of no validity as affecting title to lands in another; but if a will be made and proved in another State, an attested copy of it may be admitted to re-record and made valid in Virginia and Ohio.

10 Wheat. 192–204.

Wills as to lands in different States. A duly certified copy of a will of lands, and the probate thereof, in the orphan's court in Maryland, is not evidence in an action of ejectment, of a devise of lands in Tennessee: 2. The local law of Maryland, as to the effect of evidence of the probate of a will of lands, in ejectment, is the same with the common law.

10 Wheat. 465–472, Darby's lessee *v.* Mayer & al.

A will made in a *foreign* country, according to law there, is not valid in this till here proved in the proper court. The *lex loci* governs as to real estate. 7 Wheat. 248.

12 Wheat. 169–176, Armstrong *v.* Lear, adm'r.

New Hampshire. In this State the statute enacts, if any person *die seised* of lands, &c., they shall descend, &c.; this seems to require *actual seisin*.

A deed of lands given to a child in consideration of love and affection, is an *advancement*.

2 N. H. Rep. 460–461, Parker *v.* Nims & al.

A, died seised in fee of lands, descended to him from his father, having uncles and aunts on his father's and on his mother's side, who were the next of kin, and also children of a deceased aunt. Held, the land descended, in equal shares, to the uncles and aunts on both sides, but nothing to said children, there being no representation among ascendants.

§ 11. As the act, after providing for the lineal descendants, provides only for the *next of kin*, as the mother is next of kin to her children, she inherits of them if no issue or father, though the intestate child leave brothers and sisters. But one exception is, where one dies who received estate by descent from his or her father, before married and of age, it goes to brothers and sisters, if of age, the mother has a sister's share. If a person dies of age, or married, leaving no issue, but a widow and a father, he takes half and she half in fee simple; if no widow, he takes all. The widow's moiety is in lieu of dower. The intestate must die seised.

§ 8. *Ancestral* and *acquired* estates, are distinguished. In the ascending and collateral lines, if the estate be ancestral, the relations of the intestate who were relations of the persons from whom it came, are preferred to all other relatives, however near the latter may be to the intestate. For the meaning of *ancestral* and *acquired* estates, see n. 1, s. 8.

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§ 8. As to ancestral estates, there is no distinction of whole and half blood. Hence in this State this distinction of blood respects the acquired estate only.

An estate in fee by deed or will, may be created to commence in future.

The intestate need not be actually seised of the real estate he owns; it is enough he have a title or right to it or an interest therein; as in Massachusetts, Virginia, Kentucky, &c.

Art. 6. *Con.*

In New York, all lands sold, are held in fact as well as in form, by an *allodial* tenure, though expressed in deeds, 'in fee simple,' in the old form.

20 Johns. R. 483, Leon v. Burtis. 18 do. 426.

A, holding lands by *defeasement* merely, cannot levy a fine, so as to affect strangers. A fine, and five years non claim, are conclusive evidence of title in the cognizee, against all persons not under legal disability; and a fine alone, is sufficient to support an ejectment against a person who has entered during the five years, without title.

2 Cowen, 569–572, Whitaker *v.* Young and Young, impleaded with Youngs' heirs of Young deceased. *Assumpsit* on the act (1 R. L. 316,) 'for the relief of creditors against heirs and devisees.' Form of a declaration, on the simple contract of their ancestor. Act directing the mode of proceeding against joint debtors, where a part only are brought into court, (1 R. L. 521,) does not apply to an action against heirs, &c.: 2. These are liable only to the extent of their inheritance: 3. If some are not warned, those who are, must plead it in the first instance, or they lose the benefit of contribution: 4. If it appears in the declaration that only a part of the heirs, &c., are arrested in the suit, those so arrested may demur. See ch. 136, a. 19, s. 4.

§ 26. Laws enacted before the year 1827, when the statutes of this State were again revised.

The statutes in this State have avoided the terms *legal representatives*, and *next of kin;* but the takers are specifically described, yet in construction and practice, the said statute of distribution of Charles 2d, is followed as to real, as well as personal, estate, to a great extent.

The mother cannot inherit in any case. No distinction of whole and half blood. When all the claimants are nephews, they take *per stirpes* by statute; by that of Charles II, *per capita*. Regard is had to the estates coming from father or mother, if from her to a child and it dies intestate, the father cannot take, but can if the estate come not so.

§ 27. So regard is had to ancestral and acquired estates. The widow has dower at common law. The statute (before 1827, if not since,) enacts if no father, the ancestral intestate

estate shall descend to the intestate's brothers and sisters of the blood of the ancestor from whom it came. If none such living, then to the children of such brothers and sisters *per stirpes*. If no such children, then as the common law directs, that is, to the next collateral kinsman of the whole blood, preferring males to females, and the eldest male to all other males. Acquired estates go to the children of deceased brothers and sisters of the half blood, who take *per stirpes*, they being the nearest relations to the intestate in the ascending line; the act goes only to the father.

§ 28. Ejectment to recover twenty acres of land on lot No. 93. Held, 1. In certifying the acknowledgment of a deed or mortgage, on the act 1 R. L. 364, s. 1, it is sufficient for the officer to say, 'on ——— came A B, *to me known*, and acknowledged he executed the above deed (or mortgage) for the uses and purposes therein mentioned,' &c., without saying 'to me known to be the person described in, and who executed the said mortgage,' (or deed): 2. That the omission of this clause has been extensively practiced in the State; so that many titles would be disturbed by allowing it to affect the certificate. Would perhaps amount to a construction of the act, and at all events would render the court unwilling to listen to an objection for this cause: 3. An affidavit under the fifth section of the act concerning mortgages, (1 R. L. 374.) is sufficient, if certified in this form: 'sworn before me this first day of November, 1821, George Dexter commissioner,' without expressly certifying that the deponent appeared before him, &c.: 4. A deed to, and from, a lunatic, before office found, is only voidable; so one not privy with the lunatic, cannot object his insanity: 5. The objection that a conveyance of land is void, because the grantor is not in possession, does not apply to a patent or deed of land from the people of the State. No adverse possession can prevail against the State. The words *known to me*, are material. The objection to the grantors being not in possession, is allowed, to prevent *maintenance*, and does not apply to the State, or to executors, &c., selling in *auter droit*, and by naked power.

Jackson v. Gumaer, 2 Cowen, 552—569.

§ 27. The intestate's estate, real and personal, has, since the revolution, descended to all his children; but the sons have double, the daughters single portions; this in equity, is extended to brothers and sisters, and to nephews and neices.

ART. 7. *Con.*

Brothers and sisters of the whole blood and their issue, exclude the half blood. In all cases in the ascending line and in all others in the collateral, the law of this State follows the English law, hence the father never can inherit of the child directly. No distinction as to ancestral and acquired estate, or

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father's or mother's side; by the statute the half is postponed to the whole blood. It is sufficient the intestate have an interest in the estate; seisin is not required.

§ 15 *con.* Where the intestate's issue are in degrees unequal of kindred, the more remote take *per stirpes* what their parents, if living, would have taken. The mother never can take an estate coming on the father's part.

The exclusion of the half blood is thus limited. Virginia. If no issue of the intestate, father or mother, brother or sister, of the whole blood, or their descendants, then brothers and sisters of the half blood and their issue, inherit to the excluding more remote kindred of the whole blood, in case the estate came by descent and devise, or deed of gift, of some ancestor; and no relation of the intestate can inherit it, except he be of the blood of such ancestor.

Generally, if no issue, father, mother, brothers or sisters, of the whole or half blood, or issue of them, the estate goes to the next of kin in equal degree; and if any such be dead, then to their issue *per stirpes* and *ad infinitum*. By the statute of Pennsylvania, in several cases, estates are taken *per stirpes*, where by the said statute of Charles II, they are taken *per capita*.

Note. There has been in force in this State near thirty years, a statute that forbids British authorities of a date posterior to the revolution, to be read or quoted in the courts of justice, in Pennsylvania. This may be right in some cases; as where these prohibited authorities do not explain those of a date anterior to the revolution. Be this as it may, it is clear it is best to leave such matters to the courts of law.

§ 22 *con. Case of a new acquisition in new lands.* A made a small improvement on vacant lands, and died, not having made any settlement, or having had any view to residence. After his death, a warrant to include his improvement was taken out by his brother, for the benefit of the daughter of A, paid for by funds derived from her father. Held, the estate did not come to her *ex parte paterna*, but was a new acquisition, which, on her death, descended to her brother of the half blood. Simpson *v.* Hall, 4 Serg. & R. 337.

Constructive possession. If a person makes a settlement on a vacant lot, with intention to take up the whole, the law extends his possession over the whole. Gilday *v.* Watson, 2 Serg. & R. 410. The effect of improvements made, as to titles. 1 Serg. & R. 128; 2 do. 488; 4 do. 427–467; 5 do. 266; 1 Yeates, 516; 3 do. 73, 272, 523; 4 do. 266, 429, 562; 4 Binn. 161–218; 2 do. 476; 5 do. 77, 186–211; and scores of other cases in these three authors, as in Dallas,

on this subject; merely arising out of statutes almost peculiar to Pennsylvania.

§ 27. Equity powers in Pennsylvania. Before the revolution, the legislature refused to establish a court of chancery, to prevent the increase of the governor's power, who claimed to be chancellor. But the courts of law, by degrees, exercised chancery powers to a considerable extent; and adopted chancery rules. And it has been the settled practice of the supreme court, to proceed on equity principles. 1 Dall. 144; 4 Dall. 13. Ebert v. Wood, 1 Binn. 217.

Equity being viewed as part of the law in this State, the courts allow a deft. to put in a plea founded wholly on equity. Pollard *v.* Shaffer, cited ch. 78, a. 10, s. 9; ch. 117, a. 5, s. 1. Case of destruction by the enemy. According to this case, where the forms of the common law are not adequate to do justice, the courts of law, to reach the equity of the case, may allow the parties to form declarations and pleas proper for the case, before the court. On this general principle, we find the law courts in Pennsylvania exercising a very large portion of all the powers appropriated in England to the court of chancery. And these courts have established near fifty rules to regulate pleadings and practice in equity cases; including bills, subpœnas, pleas, answers, demurrers, and most of the common forms used in the proper courts of equity. In Pennsylvania, there being no court of chancery, the courts of law consider that as done, which chancery would decree to be done. The court determines the mode, manner, and extent of relief to be given in equity, by the common law courts, in Pennsylvania. The jury's verdict may find the facts on which the equity of the court is called on to interpose, but cannot set aside a contract. Witman *v.* Ely, 4 Serg. & R. 266. 3 Serg. & R. 578; Jordan v. Cooper. 4 Serg. & R. 301; 4 Binn. 41.

In equity, generally, time is not essential, but considerable delay not accounted for, is viewed as an abandonment, or is material, where it diminishes the value of the thing contracted for. Bellas *v.* Hays, 5 Serg. & R. 427.

§ 28. In Pennsylvania, the courts of law have assumed equity powers, as stated in another place; and 15 Serg. & R. 64, &c., in the case of Heger's executors, in a probate case, the supreme court recognised and held, it was governed by the law, as it was administered by courts of equity; so adjudged that where executors purchase the notes of a bank at a discount, and with them pay a debt due by the testator to the bank, the estate has the benefit of such discount, and not the executor. Quere, if they purchased the notes with their own money. And p. 118, Kuhn *v.* Nixon, shows her courts practice in many cases, as do courts of equity; and that equitable principles are to be applied by a jury in the courts of law,

Vol. VII. Ch. 223. *Art.* 8. *Con.* under the direction of the court. This blending law and equity in the courts of law in that State, requires particular attention, for thereby their decisions are rendered more inapplicable in other States, than at first view appears.

Art. 9. *Con.* § 10. Only brothers and sisters of the whole blood, and their children and grandchildren, are preferred to the half blood; and on failure of brothers and sisters of the whole and half blood, and of their legal representatives, the estate of the intestate goes to the next of kin, and their legal representatives. It is doubtful, if representation among collaterals extends only to grandchildren, or *ad infinitum*. No preference of the whole blood where the estate is *ancestral*. There are several distinctions of blood in other cases.

Art. 10. *Con.* § 1 *con.* But neither a deed of bargain and sale *not indented*, nor a *derise*, will bar an estate tail: 2 Har, & Mc H. 175: on the act of 1783, ch. 23; nor did the act of 1692, ch. 30, for recording conveyances, &c., extend to any proprietary grants. p. 385.

§ 3 *con.* The statute 1699, ch. 42, prescribes a particular form of examination of the wife. Held, she must be examined in that form, and the certificate of the two justices examining her, must contain the form in substance. Adjudged April 1723, by the provincial court; deft. excepted, and the court of appeals, July 1724, revised the judgment. Appeal allowed to the lord proprietary; Robins, lessee *v.* Bush; see 2 Har. & Mc H. 19–25; a correct form of examining on statute 1715, ch. 47.

1 Har. & Mc H. 50—57.

2 Har. & Mc H. 19—38; 3 do. 430.

If A bequeath to his wife a part of his personal estate, and she dies within the forty days, without making her election to abide by his will or not, her representatives must abide by the will, decided in the orphans' court, and affirmed in the general court.

3 Har. & Mc H. 95.

Judicial decisions in Maryland on the subjects of this chapter, from A. D. 1658 to 1798, &c. By many decisions Maryland appears to have adopted, in disposing of new lands, the principles adopted in Virginia, &c., and Pennsylvania, stated a. 8, s. 22, a. 15, s. 2, this chapter.

§ 19. A bargain and sale by a *feme covert*, with warranty, does not discontinue the estate: 1 Har. & Mc H. 275–280, Mayson's lessee *v.* Sexton: many cases cited, and several to show a married woman in *her deed* may warrant. See ch. 106, a. 4, s. 2, 3, 4, 5, and ch. 115, a. 4, s. 32; Hob. 20, 225.

Held, 21 Jam. 1, act for limitation of action extends not to Maryland: 1 Har. & Mc H. 2[illegible], 30, 32; but 518 the grantee being attainted, his lands were forfeited to the lord proprietary.

1 Har. & Mc H. 2—190.

In this State, ejectment in the English form only, seems ever to have been used to recover lands; the bounds of which have ever been rather uncertain, for reasons stated in the preamble of a long act passed in June 1699, and in other long acts passed April, 1715 and 1718, published 2 Har. & Mc H. appendix.

In this State, Mortgages are tried on English principles: 2 Har. & Mc H. sundry cases. A writ of inquiry of damages lies in ejectment; 96, 97; 3 Har. & Mc H. VOL. VII. CH. 223. *Art.* 10. *Con.*

Mortgages are treated, in general, in Maryland, as they are in England; 20 years redemption, &c., not within the acts of limitations, &c. 3 Har. & Mc H. 328, 332, 399, 400.

Since the act of 5 Geo. 2, ch. 7, the Maryland act of 1715, ch. 40, has been extended to lands, that is, making them liable for debts, &c. 3 Har. & Mc H. 594.

If a mortgage include both real and personal estate, and the mortgagor retain possession of the personal, the deed must be enrolled in the records of the *county* within twenty days from the date of it, so that an office copy of such mortgage, may be given in evidence on a question, as to personal estate: was replevin for two slaves; deed was recorded in the records of the provincial court, in 1763; in 1799, the general court: the act of 1729, a. 8, s. 5, required it to be recorded in the county, in order to use an *office copy*, in twenty days from its date: the general court admitted the copy to be read to the jury: the plt. excepted, &c. Court of appeals, June 1, 1803, reversed the judgment, and awarded a *procedendo*. 4 Har. & Mc H. 405—409.

Conveyance by *fine* was used by a *feme covert* before the act of 1713, ch. 47, but not since, in Maryland. 3 Har. & Mc H. 428.

The widow is entitled to one third of the *personal* estate of her deceased husband after death, and funeral charges paid, though he, by his will, bequeath the whole of it away from her. Authorities cited, *magna charta*, ch. 180, saving to her a reasonable part: Bracton one third; so at common law: acts of Maryland 1642, 1671, one third; so acts of 1681, 1692, 1699; so 1704, 1715, 1729; 4 Har. & Mc H. 101–123.

No distinction of whole and half blood in cases of *descended* estates, is as to acquired estates.

The statute of descent and distribution, regards the *ancestral, paternal, and maternal estates;* hence, no such *paternal* estate can pass to the *maternal* line, as long as any paternal ancestor, or his descendants can be found: same principle as to the maternal estate.

§ 18 *con.* This is a rule in most of the States, and may well be the rule in all, that is, that personal estate be divided, as real estate is, &c. The statutes of descent and distribution only require the intestate *to have title* to the estate. They regard no distinction as to the *whole and half blood*, except those of the whole take double portions; of the half, single ones. When all the claimants are in the same degree, they take *per capita*. When some are dead, and all are not in the same degree, the most remote take *per stirpes;* so is the act of Charles II. Alienage does not impede the descent. As to the *mother*, illegiti- ART. 11. *Con.*

Vol. VII. Ch. 223. *Art.* 11. *Con.*

mate children can inherit and be inherited. A child born out of wedlock is legitimate, by the *after* marriage of its parents, if the father recognize it to be his.

If no issue of the intestate, father, mother, brother, or sister, nor issue of them, (*ad infinitum*) the estate goes half to the *paternal* kindred, half to the *maternal:* no distinction of *ancestral* and *acquired* estates: but is, as to *paternal* and *maternal* relatives, as the estate goes first to grandfathers, and if none, to grandmothers, &c., and their descendants *ad infinitum*.

When no relations in the paternal line or maternal, the estate goes to the other line so long as any kindred in it, are to be found, and if all these fail, it goes to the intestate's husband or wife, as the case may be; if neither, to his or her relatives, as it would, if he or she had lived to take it. Thus, when the husband dies intestate, and leaves no relatives descending, collateral, or ascending, the statute creates his wife and her relatives a new stock, to inherit his estate; and if she die first, then her relatives, and so if she so dies, the statute so creates him and his relatives. Hence, an escheat can rarely be.

The statute of Virginia is as that of Charles II., as to the intestate's descendants, and if none, as that is as to fathers and mothers, grandfathers and grandmothers, brothers and sisters, their children and grandchildren, uncles and aunts, and their children, being the rule *next of kin*.

If no issue, or father, the mother, brothers, and sisters take *per capita;* so is the act of Charles, altered by that of James II. Difference is in the whole and half shares, as above.

In Virginia, children of deceased brothers of the intestate, exclude great grandfather, uncles, and aunts. In England, they take with the children all being in the third degree; so in Virginia, such children exclude the grandfather; and any issue of brothers and sisters, however remote, exclude grandfathers, uncles, and aunts, and their issue. By both statutes, grandfathers take when there are no issue, father, brothers, sisters, nor issue of them: if no grandfathers, grandmothers, uncles, and and aunts take by statute, though in different degrees. In England, only grandmothers by statute of Charles II.: by both statutes, uncles and aunts take if no grandfathers or grandmothers. If part of the uncles and aunts be living, and part dead, leaving children, by the statute of Charles, the children take nothing; by that of Virginia, they take their parent's shares *per stirpes:* by the English act, the posthumous child of a *collateral* relation, inherits; not so in Virginia. Other cases are numerous in distinctinctions not very important, in which the two statutes agree; so, numerous in which they do not agree.

By statute of 1819, if a *minor* die without issue, having title to any real estate of inheritance, derived by descent, devise or

gift, from his or her father, and leave father, brother, or sister, on the father's side, or paternal grandfather or grandmother, or brother or sister of the father, or any descendants of any of them, the estate goes to the *paternal* relations alone, saving dower. If the estate be so derived from the mother, the course is reversed, saving curtesy. All lands descend in *coparcenary*; hence, no survivorship among joint tenants. VOL. VII. CH. 223. *Art.* 11. *Con.*

Representation is admitted *ad infinitum*, in the *collateral* as well as in the descending line, and if the claimants be not all in the same degree, they take *per stirpes*, in both lines. If all be in the same degree, *per capita*, with a few exceptions.

Before the revolution, real estate descended in Virginia as in England; both in fee and tail, except the entailed estate could not be docked in Virginia.

If the mother be emancipated, her increase cannot be slaves, though their slavery be reserved in her emancipation. 4 Rand. 597—600.

§ 37 *con.* Not necessary a will be proved in a probate court, to give it validity as a will of lands. May be dated one day and published afterwards. 2 Rand. 190—206.

§ 40 *con.* A marriage settlement made after marriage, in pursuance of articles entered into before marriage, is to be controlled by the articles. 1 Rand. 322—327.

§ 46 *con.* Other cases of this writ *ad quod damnum*. 3 Har. & Mc H. 565; 4 do. 1, Coleman *v.* Moody; 1 Rand. 282, Harwell *v.* Bennett; Hard. 63: a deputy sheriff may execute and return this writ of *ad quod damnum*.

§ 7. Statutes of descent and distribution. The intestate's estate goes equally to his or her children, and their descendants, as long as any can be found. ART. 12. *Con.*

If no issue, and the estate be derived by descent, devise, or deed of gift, or settlement from an ancestor, to whom, in case of his death, the intestate would have been heir, the estate descends to the next collateral relations of the intestate, and their descendants, being of the blood of such ancestor, always taking *per stirpes*: if not so derived from an ancestor, or his blood fails, the estate goes to the next collateral relative, whether of the paternal or maternal line, to be distributed *per stirpes*; and representation is *ad infinitum*.

If no issue, brothers or sisters, or their descendants, the parents take for life, and to the survivor for life. Among collaterals, no distinction of whole and half blood: the degrees of kindred are computed by the *common* law. Males were preferred to females, till of late years.

The intestate may be seized in fact or in law. No *inheritances* can pass to the *ascending* line.

As to North Carolina and the other five States south of Virginia and Kentucky, it appears, ch. 196, a. 7, this work, that in the

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year 1712, the Carolina legislature then having jurisdiction over all the territory of those six States, by stat., adopted more than one hundred and twenty British statutes, most of which remained in force to the revolution, and many of them to this time as common law: among which were the 11th and 12th W. 3, ch. 6, as to heirs claiming through aliens: 22d and 23d Ch. 2, ch. 30, as to intestate personal estates: 10th and 11th W. 3, ch. 16, as to posthumous children. It is also to be considered that the territorial ordinance of July 1787, except as to slavery, was extended to Tennessee, &c., when territories; and as Tennessee was settled under it, and under the laws of North Carolina, from which it separated, we have in substance in these, the laws of descent and distribution in Tennessee, not much altered by her statutes.

ART 13. *Con.*

§ 17 *con.* Claimants take *per stirpes*; as in North Carolina, the wife and father living take the intestate's estate in equal moieties: if he be dead, she and the mother so take it; if no wife, the father, brothers and sisters of the whole and half blood take it in equal shares: if he be dead, they and the mother so take it, and the issue of a deceased brother or sister takes its parent's share; If no issue, father or mother is alive, but there are a widow, brothers and sisters of the whole and half blood, and children of a deceased brother, of the *whole* blood, she takes half in fee, and the brothers and sisters of the *whole* blood and said issue, take the other half equally, the children taking their parent's share. If no brother or sister of the whole or half blood, but children of a deceased brother of the whole blood, the children take half *per stirpes*. There are numerous other such kind of distinctions.

ART. 14. *Con.*

§ 2. The widow, however, is put on the footing of a child, in dividing the estate among children, unless she elects to have her dower. No representation is admitted beyond brothers' and sisters' children. If no issue of the intestate, the widow has a moiety in fee: if a father is alive, he, and the brothers and sisters of the intestate, of the whole and half blood, take the estate, and the mother is excluded; but if the father be dead, she takes, with the brothers and sisters, as he did. The wife's *real*, as well as personal estate, vests in her husband on their marriage: after these, the *cousins* take. Cousins are the children of uncles and aunts, of great uncles and great aunts, &c. The statute places fathers and mothers, among brothers and sisters, in the second degree. On failure of issue, parents, brothers, and sisters, and their children, and cousins; the act gives the estate, real and personal, '*to the next of kin*,' in this case following the statute of distribution of 22 and 23 of Charles II., extending it to real estate also. After the above specific provisions, there are to be included in the words, *next of kin*,

grand parents, in the second degree, by the civil law; great grand parents, in the third degree; uncles and aunts, great great grand parents, uncles and aunts, and grandchildren of brothers, and sisters of the intestate, all in the fourth degree; so according to the ascending line, to the fifth degree, &c; and descending in the issue of brothers and sisters, to the fifth degree from the intestate, &c. Cousins *specifically* provided for, include all cousins, first, second, third, &c. So great great uncles, and great great aunts in the fifth degree, are included in the words next of kin. When all the claimants are in the same degree they take *per capita:* under the words next of kin, as great uncles, and great aunts, and grandchildren of brothers and sisters, all in the fourth degree. If no issue, father, mother, brother or sister, or legal representatives, first cousins take a moiety, and the widow a moiety in fee.

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§ 16. By statute enacted Dec. 19, 1796, it is provided, section 1. that 'when any person having title to any real estate of inheritance, shall die intestate, as to such estate, it shall descend and pass in coparcenary, to his children, male and female, in the following course, that is to say, section 2. To the children and their descendants, if any there be: section 3. If no children nor their descendants, then to his father: section 4. If there be no father, then to his mother, brothers, and sisters, and their descendants, or such of them as there be: section 5. Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, the mother of such infant shall not succeed to, nor enjoy the same, nor any part thereof, if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them, saving to such mother her right of dower, which she may claim in said real estate of inheritance: section 6. Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from his mother, neither the father of such infant, nor any issue which he may have by any person other than the mother of such infant, shall succeed to, or enjoy the same, or any part thereof, if there be living any brother or sister of such infant, or any brother or sister of the mother, or any legal descendant of either of them, saving, however, to such father, the right which he may have as tenant by curtesy in the said estate of inheritance: section 7. If there be no mother, nor brother, nor sister, nor their descendants, then the inheritance shall be divided into two equal moieties, one of which shall go to the paternal, the other to the maternal kindred, in the following course, that is to say, section 8. first: To the grandfather: section 9. If there be no grandfather, then to the grandmother, uncles and aunts, on the same side, and their descendants, or such of

ART. 15. *Con.*

VOL. VII. CH. 223. *Art.* 15. *Con.*

them as there shall be: section 10. If there be no grandmother, uncles nor aunts, nor their descendants, then to the great grandfathers, or great grandfather, if there be but one: section 11, If there be no great grandfather, then to the great grandmothers, or great grandmother, if there be but one, and the brothers and sisters of the great grandfathers and grandmothers, and their descendants, or such of them as there be: section 12. And so on in other cases without end, passing to the nearest lineal male ancestors, and for the want of them, to the lineal female ancestors, in the same degree, and the descendants of such male and female ancestors, or to such of them as there be: section 13. But no right in the inheritance shall accrue to any person whatever, other than to children of the intestate, unless they be in being, and capable in law to take as heirs, at the time of the intestate's death: section 14. And where for want of issue of the intestate, and of father, mother, brothers, or sisters, and their descendants, the inheritance is before directed to go by moieties, to their paternal and maternal kindred: if there should be no such kindred on the one part, the whole shall go to the other part; and if there be no kindred either on the one part or the other, the whole shall go to the wife or husband of the intestate; and if the wife or the husband be dead, it shall go to his or her kindred, in the like course, as if such wife or husband had survived the intestate, and then died, entitled to the estate: section 15. And in the cases before mentioned, where the inheritance is directed to pass to the *ascending* and *collateral* kindred of the intestate, if part of such collaterals be of the *whole* blood to the intestate, and the other part of the *half* blood only, those of the *half* blood shall inherit only *half* so much as those of the *whole* blood; but if all be of the *half* blood, they shall have whole portions, only giving to the ascendants, (if there be any) double portions.' Thus far, *verbatim:* section 16, directs taking *per capita* or *per stirpes;* section 17 provides in cases of advancements; section 18 is on the principle of the statute of W., as to aliens; section 19 is as the law of Virginia as to bastards and legitimating; section 20 provides for selling in certain cases; section 21, and last, makes parceners equal, and gives one an action of waste against another. Feb. 24, 1797, an act of fiftyeight sections was passed, as to wills, executors, &c., and distributions of personal estate.

ART. 16. *Con.* Vat. Law of Nations, B. 3, ch. 13, s. 19, s. 7; 1 Bl. Com. 108.

§ 9. When Louisiana was ceded to the United States, of course, the former laws remained in force, as far as not altered by the United States. When a country inhabited has laws in force, they must, when it is purchased, remain so, until altered by the purchaser, in some form, or there must be a state of anarchy. But little is to be found in the books on this subject; the reason may be, common sense seems to dictate the course.

The people keep their former laws till the purchaser or conqueror gives them his laws, at once, and immediately, *in toto*, or, by degrees, and in time; and the former laws remaining in force after the acquisition of the territory, become the *common law* of the country. As to Louisiana, ceded in 1803, special provision was made by congress, Oct. 31, 1803, for the government thereof, and before possession thereof, was taken, the former laws were left in force some time, and were altered by degrees: so the former laws of Florida were understood, as a matter of course, on the principles of the laws of nations, and our common law, to have remained in force long after the United States took possession: a few cases excepted.

ART. 17. *Con.*

§ 4. Concerning the laws of descent and distribution in Ohio, see a. 1. s. 3, and a. 17, s. 1, this chapter. The said territorial ordinance was the basis of all law in Ohio. No estate ever descended there on the English common law; nor was the said statute of Charles II., of distribution, ever in use there, otherwise, than the material parts of it are contained in the said ordinance. The statutes of Ohio, have made some alterations in the *collateral* and *ascending* lines: 1. A distinction between *ancestral* and *acquired* estates; the *ancestral* estate goes to such brothers and sisters of the intestate, as are of the blood of the *ancestor* from whom it came, and their legal representatives; and if no issue, brother or sister or their representatives of the blood of such ancestor, it goes to him, if living: if he, also, be dead, it goes to his brothers and sisters, or their representatives; and if none of them, it goes to the intestate's relations of the half blood, *not* of the blood of such ancestor. If no issue, brothers or sisters, or their representatives of the blood of such ancestor, and he is dead, nor brothers or sisters of their representatives of said ancestor, nor brothers nor sisters not of his blood, then the estate goes to the *next of kin* of the blood of the person from whom it came by descent, devise, or gift to the intestate; no further provision is made for the descent of an *ancestral* estate; and if no such next of kin, it is conceived the estate will go according to said ordinance, that is, to *the next of kin to the intestate.*

If the estate be *acquired* by the intestate, by his or her own means, or given, or devised to him or her, by one no way related to him or her, it goes to the intestate's issue as long as any exist; and if no issue, then to the intestate's brothers and sisters of the whole blood, and their legal representatives; if none such, it goes to the brothers and sisters of the half blood, and their legal representatives; if none such, to the father, and if he be dead, it goes to the mother; if no such relations, it goes to the next of kin to the intestate, who need not be actually seised, but only have a title to it: and aliens may inherit and be in-

herited: the widow has her dower, and illegitimate children are as to the *mother*, and illegitimation as in Virginia. The husband has his curtesy.

Remarks on the laws of descent and distribution of intestate property in the twentyfour States. These laws, in two States, Massachusetts and Maine, have been largely considered in this work, from the first settlement of those States, as is proper, in every State, when the plan of the work admits such a course; but the plan of this does not—proper, as in many trials, it is found necessary to use these laws, and the judicial decisions thereon, very far back: as where a person died intestate, leaving estate, it was, of course, settled by such laws then in force. These then entered into the title, though a century or two ago, and must forever remain a part of it. As to the States, Vermont, Kentucky, Ohio, Tennessee, and Louisiana, these laws have not, in this work, been traced back (for reasons above stated,) but only a sketch has been made of those of them understood to have been the last enacted, and in force in the year 1820, and since enacted.

These sketches have not been made for practice, especially in doubtful cases. In that only, the statutes themselves, from early times, and the judicial decisions thereon, can be safely trusted.

As to these laws of descent and distribution, more than any others whatever, every line, and often every word, is material, for when a person dies intestate, having property, and kindred however numerous and remote, the very persons to take, and their exact proportions, must be exactly ascertained by such laws in force when the intestate died, though long since; and if any part of these laws be misconstrued, as to any one taker, or any one proportion, the estate is not well settled, and till this fault is corrected or waived, no after settlement is correct. But these sketches are for other purposes mainly: 1. To show the sameness there is in twentythree States, in the principles of these laws in the main points, especially as they respect lineal descendants of the intestate, his children, and others, his issue, however remote: 2. To show the immense heterogeneous variety and fanciful distinctions, that are in the minute and less important parts of these laws. Probably not half of them in the said last enacted statutes, are noticed in this work, to say nothing of a far greater number in prior statutes: 3. To suggest an inquiry if it may not be wise, to prevent the rapid increase of this chaotic mass, soon to think of making our descent laws more simple and rational, wherever, and whenever it can readily be done, on the sound republican principles of our system. As to the most essential and important part, the descent of intestate estates to children, and other lineal descendants of the intestate,

the States now agree, with one or two exceptions in giving male children double portions, and females single ones, a relic of feudality rejected by almost every State, and totally rejected in the said statute of Charles II. Those States, ought gradually, as they shall revise these laws, to extend the simple uniform principles of those statutes to real and personal estate; and unanimously so in the said territorial ordinance. Numerous are the cases in which judges, lawyers, and authors, find a deplorable uncertainty in the minute and various distinctions, found in these laws; increased almost yearly by twentyfour legislatures independent of each other; and twentyfour judiciaries deciding thereon, independently; by repeated revisions of, additions to, and alterations in these laws. Before the new French code was enacted, it was said of the former French laws, they were so numerous and various in different provinces, that a lawyer might well understand them in one, and know nothing of them in another: so it may be said of our laws of descent and distribution; generally, a lawyer may well understand them in one State, and know nothing of them in another: as before observed, this difficulty is quite peculiar to these laws. Concerning the laws in the different States, on the subject of wills, conveyances, uses, leases, insurances, bonds, bills, notes, accounts, pleadings, bail, &c., &c., there is such a sameness in all the twentythree States, that a good lawyer in one State, may, with a moderate degree of preparation, practice in any of them. Not so is the case of the laws of descent and distribution. In such numerous conditions are intestates and their property,—in such numerous situations are the claimants and the takers, and so infinitely various their shares or proportions, that no end is seen in the multiplied forms into which these laws may be made to run, if legislators will freely indulge in all kinds of *minutiæ:* the more need, therefore, to restrain them, by fixing some principles, fundamentally pervading the nation to restrain this intolerable variety. This is now done in France, has been done in England one hundred and sixty years, as to personal estate, by the said statute of Charles II. Where the same principles do, in substance, and ought to pervade the whole nation; the form of a *federal* republic makes no difference; and if any laws in such a republic, ought to be as fixed and unalterable as the constitution, they are those that direct the descent and distribution of property.

In fact the evidence is that more than three fourths of the States are well prepared to exclude in future, every relic of feudality from our laws, and nineteen twentieths of these deviations in these laws of descent and distribution. Numerous little and notional deviations from the said statutes of Charles II. and James II., under which our legislation commenced, as to per-

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sonal estate, in all the colonies, and as to real in some also, it is believed attention to the subject only is necessary to induce State legislators to abandon, and return to the statue.

§ 1. *True northern boundary.* British and Spanish titles there. Held, a concession of lands made by the Spanish authorities at *Mobile*, in the year 1806, cannot be given in evidence to support an ejectment in the courts of the United States, the same not having been recorded or passed upon by the board of commissioners or register of the land office, established by acts of congress relating to land titles in that country. The English king's proclamation of October 7, 1763, established the northern boundary of Florida at the thirty-first degree of north latitude, &c. as in the treaty of peace of 1783. Acts of congress March 3, 1803, s. 5, as to recording grants; of March 27, 1804, as to recording grants and said board; cession, &c. of Georgia, April 24, 1802; treaty with Spain, Oct. 27, 1795. Great Britain, by the preliminary articles of peace of Nov. 30, 1782, having admitted the United States' right to said 31st degree, &c. could not afterwards in her treaty with Spain, Jan. 20, 1783, cede to her land or jurisdiction north of said line, yet Spain continued to claim north of that line until said treaty of 1795 was made, adopting the said line of 1783, but neither treaty, divested private rights or titles to soil, previously vested. A. D. 1806, the Spanish authorities were in the actual possession of Mobile, and claimed the place as being a part of West Florida. The United States claimed it as part of Louisiana, purchased by them in 1803, and the dispute was settled only by their purchase of the Floridas, in Feb. 1819, by which they were bound to confirm certain inchoate rights or titles to lands in Florida, acquired under Spain. The manner of confirming grants in Florida and Louisiana, congress has ever assumed, whether made by France, Spain, or Great Britain, and this manner is seen in said two and other acts.

Ch. 89, s. 4, s. 26; 12 Wheat. 522 to 545; 12 Wheat. 599-603, De La Croix v. Chamberlain.

ART. 19. *Con.*

Congress has exclusive legislation in the District of Columbia. How easy is it for the legislature of the nation to set an example of this simple and already well-explained legislation, found in those statutes of Charles and James, or of Charles alone? And to extend the principles thereof to real as well as personal estates. At present, the laws of Maryland remain in force in the Maryland part east of the Potomac, and the laws of Virginia in the Virginia part of the district west of that river as to intestate estates.

CHAPTER CCXXIV.

SEIZURES IN REVENUE AND OTHER CASES.

§ 2. Seizures made on *land* and *water*, to be kept distinct. Hence a libel, stating a seizure to have been made on *water*, when in *fact* made on *land*, will not support a verdict and judgment, or sentence thereon; but must be amended or dismissed: 2. As to seizures on *land* under the revenue laws, the district court proceeds, as at common law, according to the course of the exchequer, on informations *in rem*, and the trial of the issues of fact is by jury. But as to seizures on *water navigable from the sea by vessels of ten or more tons burthen*, it proceeds as an instance court of admiralty by libel, and the trial is by the court. The district courts are both courts of common law, and admiralty jurisdiction. See ch. 186, a. 9, s. 10, and cases therein cited. The Sarah, 8 Wheat. 391—397.

So goods are not forfeited by any mercantile devise, where there is no intention to defraud the government, as 10 Wheat. 421–427; under the duty act of 1799, ch. 128, s. 43, no cause of forfeiture that the casks marked and accompanied with the certificates required by the act, contained distilled spirits, imported into the United States, or a mixture of domestic with foreign spirits; the object of the act being to secure the revenue.

§ 1 *con. Voyage broken. Non-intercourse act of* 1818. Held, this act of April 18, 1818, ch. 65, prohibited the coming of British vessels to the ports of the United States from a *British* port, closed against the commerce of the United States, either directly or *through a British port*; but did not prohibit such vessel's coming from a *British* port closed as aforesaid, *through a foreign port*, (*not British*,) *where the continuity of the voyage was fairly broken.* The Pitt sailed from Kingston in Jamaica, a closed port, but took in a *new* cargo in a *Spanish* port, *bona fide*, and thence came to the United States. ART. 3. *Con.* 8 Wheat. 371–379, the Pitt.

The commercial convention concluded between the United States and Great Britain, July 3, 1815, did not extend to the British colonies in the West Indies, but as to them, the navigation laws and colonial system of Great Britain, continued in full force, which the United States were at liberty to counteract by any regulations in their power.

Non-intercourse. Such vessel is not forfeited if the continuity of the voyage be not broken, though she touch at an intermediate British closed port, from necessity, and in order to procure provisions, if she do not trade there. The policy of the said act was to prevent British vessels from bringing British goods from the islands, in exclusion of vessels of the United States, and to 8 Wheat. 398–406, the Francis v. Ely.

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place them on a footing with British vessels. The system of equality was what was aimed at.

§ 7 *con.* Sixtyseventh section of this act respects opening and examining packages, &c. of goods by custom house officers, to see if they agree with the entries. Case of 200 chests of tea is a libel on this section against goods on account of their differing in description from the contents of the entry, and held it is not necessary the libel state an intention to defraud the revenue. It is sufficient the libel conforms to the language of the section, which inflicts the forfeiture. What is in a separate provision, is matter of defence. Further construction of said section 67. And of the act of April 20, 1818, ch. 364, s. 11, called the duty act. The words 'true value' in it mean the *actual costs* of the goods to the importer at the place of *exportation*, and not the *current market value* of the goods there: 2. If the collector, in fact, suspect the goods are invoiced below this *current market value*, but not below said *actual cost*, he cannot direct an appraisement: 3. If he suspects on first grounds, the invoice does not truly state the *actual cost* of the goods, he may direct the appraisement, and is not bound to disclose the grounds of his opinion. Was debt on a duty bond: 4. So was the rule from 1789 to April 20, 1818: 5. If the appraised value be less than the invoice value, the latter is taken: 6. If this be suspected, the appraiser can compare it with the *current market value*.

9 Wheat. 430–444.

11 Wheat. 419—428, United States v. Tappan and others.

§ 19. State impost laws remained in force after the federal constitution was adopted, and until congressional laws, on the subject, went into operation. 2 Har. & McH. 480–482, Maryland *v.* Sluby. Decided in the general court, and affirmed in the court of appeals, Nov. term, 1792.

ART. 4. *Con.*

§ 1 *con.* Act of Congress, March 3, 1815, gives further powers to State and district courts, as follows: Sect. 1. 'The respective State or county courts within or near adjoining a collection district, established by any act of congress now in being, or hereafter to be passed, for the collection of any direct tax or internal duties of the United States shall be, and are hereby authorized to take cognisance of all complaints, suits, and prosecutions, for taxes, duties, fines, penalties, and forfeitures, arising and payable under any of the acts passed or to be passed, as aforesaid, or where bonds are given under the said acts; and the district attorneys of the United States are hereby authorized and directed to appoint, by warrant, an attorney, as their substitute or deputy, in all cases where necessary to sue and prosecute for the United States in the said State or county courts, within whose jurisdiction the said district attorneys do not themselves reside or practice; and the said substitute or deputy shall be sworn or affirmed to the faithful execution of

his duty.' By sect. 2, the foregoing power has no regard to the amount of the sum, &c. and the jurisdiction so given is in concurrence with the jurisdiction of the district courts, but all decisions in said State courts may be reexamined in the circuit courts if in civil actions, according to the 24th section of the act of Sept. 24, 1789, (judicial act.) 3d section empowers said State and county courts, and presiding judge, to exercise all power given by the act for mitigating or remitting fines, &c. which can be exercised by district courts in cases brought before them on the act of congress of March 3, 1797, above mentioned, and by this act to be governed, but notifying said deputy, &c. 4th sect. all said courts have jurisdiction, though the sum is less. VOL. VII. CH. 224. ART. 4. *Con.*

§ 3 *con.* The law punishes the *attempt* not the *intention* to defraud the revenue by false invoices. 5 Cranch. 311; Inger. Dig. 268.

Error to the circuit court of the southern district of New York. Held, the secretary of the treasury has power under the act of congress of March 3, 1797, ch. 361, to remit forfeitures or penalties accruing under the revenue laws at any time before or after final sentence of condemnation or judgment for the penalty, until the money is actually paid over to the collector for distribution: 2. Such remission extends to the shares of the forfeitures or penalties to which the officers of the customs are entitled, as well as to the interest of the United States: 3. In Marshall's plea, for not levying an execution, stating such a remission of the forfeiture on which judgment was obtained, it is not necessary to set forth the statement of facts on which the remission was founded. 10 Wheat. 246-305, United States v. Morris, Marshall, &c.

§ 10. Forfeiture under the registry act of December 31, 1792, ch. 146, for the *fraudulent use of a register* by a vessel not actually entitled to the benefit of it on section 27, which provides, 'that if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel, and furniture.' Johnson, J. dissented. The register expressed that A was owner, and the evidence rather proved B, an alien, was the owner. Like fraudulent use, 9 Wheat. 421–430, Margaret's case. ART. 5 *Con.* The Luminary, 8 Wheat. 407–421.

§ 1 *con.* The Appollon, French vessel, seized the Spanish side of the St Mary's river, in Belle river, a branch thereof, and in Spanish territory, by the collector of St Mary's district. Held, 1. A decree of acquittal, on a prosecution *in rem*, without a certificate of *probable cause* of seizure, and not appealed from with effect, is conclusive in every ART. 7. *Con.* 9 Wheat. 362-380.

Vol. VII. Ch. 224. Art. 7. Con.

inquiry in every other court, that there was no justifiable cause of seizure, this vessel had been so acquitted: 2. 29th section of the collection act of 1799, ch. 128, did not extend to this vessel passing said river to a *Spanish* port: 3. The municipal laws of one nation do not extend beyond its own territory, except as it regards its own citizens: 4. A seizure for the breach of the municipal laws of one nation cannot be made within the territory of another: 5. A municipal seizure cannot be justified or excused upon the ground of probable cause, unless under the special provision of some statute.

12 Wheat. 1–18, the Palmyra, a case also of *probable cause*, and the piracy act of March 3, 1819, ch. 75; and May 15, 1820, ch. 112. What will justify capture and bringing in. See this case more at large art. 12, s. 24.

Art. 8. Con. Otis, plt. in error, v. Walker, 11 Wheat. 189–199.

§ 16 *con.* Error to the supreme judicial court of Massachusetts. Held, under the embargo act of 25th of April, 1808, ch. 170, [66], s. 11, the collector is protected in the honest exercise of his discretion in detaining the vessel, and securing both vessel and cargo until an actual termination of the voyage: 2. Whether the voyage was terminated, is a question of fact, and if the voyage be *colourably*, and not *really* terminated, the collector may detain the vessel, if he has honest suspicions.

Art. 9. Con. 1 N. H. Rep. 184–187, Beach v. Kezar.

§ 7. *Assumpsit* for keeping at Canaan, Vermont, six oxen six weeks, in the year 1813, intended for the enemy in Canada, and the plt. knew it. Held, he could not recover, as trade with an enemy is illegal, and no action can grow out of it. The plt. kept the oxen, knowing their destination, and with an express view to facilitate their passage to the enemy's troops, which was effected by others. 'A person claiming the assistance of the law in a particular case must not in that very case have violated the law.' This rule is not established for the deft's. benefit, often more criminal than plts. 'But is introduced on account of public policy.' See 1 Gal. 303, Potts *v.* Bell & als.; ch. 40, a. 2, s. 15, and Bell *v.* Gibson, id.; Van Dyck *v.* Hewitt, ch. 40, a. 20, s. 4; Waymell *v.* Reed, ch. 9, a. 16, s. 7. The plt., an *alien and abroad*, aided in packing goods intending them to be smuggled into England. Held, he could not recover on a contract arising out of the illegal transaction. 4 D. & E. 466–468; 7 D. & E. 630; 5 do. 599; 10 Mass. R. 277; 1 Bos. & P. 555, &c. &c.

Art. 12. Con.

§ 24. Case of the Palmyra, Escurra, master, 12 Wheat. 1–18, appeal from the circuit court of South Carolina, was a libel of information under the act of Congress of March 3, 1819, (c. 75,) continued in force by act of May 15, 1820,

(c. 112,) the libel was filed by the district attorney, as well in behalf the United States as of the captors. Question was as to probable cause of seizure of the Palmyra, (piratical vessel.) Held, 1. Though the crew may be protected by a commission *bona fide* received, and acted under, from the consequence attached to the offence of piracy, by the general law of nations, though such commission was irregularly issued; yet if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly founded suspicion, it is sufficient under the act of congress to justify the capture for bringing in the vessel for adjudication, and to exempt them from costs and damages: 2. Though probable cause of seizure will not exempt from damages and costs, in seizures under mere municipal statutes, unless expressly made a ground of justification by the law itself, yet this principle does not extend to captures *jure belli*, nor to marine torts generally, nor to acts of congress authorizing the exercise of belligerent rights to a limited extent, such as said two acts above. In the district court a claim was interposed, and the Palmyra restored without damages for the capture, injury, or detention. Both parties appealed to the circuit court. This affirmed the decree below, acquitting the Palmyra, and reversed so much of it as denied damages, but awarded damages, $10,288 58. Appeal for the United States and the captors, to the supreme court. Decision as above. In 1825, the cause had been dismissed by the supreme court on the ground there had been no final decree for damages, but finding, on search, there was such a decree omitted to be sent up, a question arose, whether the court had power to reinstate the cause after such a dismissal, 1. Because it might operate to prejudice the sureties to whom the Palmyra had been delivered on stipulation, in the court below, and because the cause was capable of being heard in the supreme court, on the appeal in respect to the decree of acquittal, that being the only decree in which the United States had any interest as a party; and that, as to the damages, the captors alone were responsible for them, and they alone had a right of appeal respecting them, so that by operation of law, the cause had become divided into two distinct causes, in which each party was an actor. The court did not admit either reason, but reinstated the cause for reasons given at large.

CHAPTER CCXXV.

FEDERAL PRINCIPLES, AND CASES IN EQUITY.

§ 9. The rules of evidence are the same in courts of equity as those of common law. The supreme judicial court, therefore, when sitting as a court of equity, under the statute of 1817, ch. 87, will not receive *parol* evidence tending to prove an agreement different from one made by the same parties in writing under seal. Dwight *v.* Pomeroy, and five others, 17 Mass. R. 303 to 329.

Art. 5. Con.

§ 2 *con.* 3 Cowen, 518, in Seymour *v.* Delaney, Savage, C. J. speaking of enforcing contracts, said the court of chancery, 'if it acts at all, must act *ex vigore*, and cannot weigh the equities of the parties. Whereas a jury in a court of law can mitigate the damages according to equity and good conscience. It seems, indeed, parodoxical to send parties from a court of equity to a court of law, to obtain equity; but it arises from the peculiar construction and practice of the courts.' 'Again, if we call to our aid the opinions of men, among the most celebrated for their learning and talents, of the times in which they respectively lived, we find a great preponderance in favor of sending hard and inequitable bargains to a court of law.' See the three points in this cause, stated post, s. 27, this article. We may add, thousands are the cases of contracts as to which equity can be done only by the jury apportioning the damages to the equity of the case, because 'the damages cannot be ascertained by the chancellor's conscience,' and there is no equitable measure but in this apportionment.

Champion *v.* Brown, 6 Johns. Ch. R. 398, &c.

§ 8 *con. Where administrators are entitled to a specific performance of a contract.* Where the vendee had a contract for the purchase of lands and died, his administrators assigned it to the defts. who covenanted to cancel the contract and save the administrators harmless in the premises. Held, 1, They were entitled to a specific performance of the covenant by the defts., who could not set up a want of personal assets as an objection *in limine*, to the relief sought by the vendors: 2. Administrators of a vendee, must have the heirs' consent, in order to assign a contract for the purchase of land, or compel its performance: 3. Therefore, in such a case, the heirs are proper parties to a bill filed for the specific performance of the contract: 4. If, in such case, the assignee take possession of the land, though not compellable to pay the purchase money, yet, as the vendor has a lien on the land, he can call on the assignee to pay, or surrender the land, or to have it sold for the benefit of the vendor: 5. If A have a contract for the

purchase of land, and dies, it in equity descends to his heirs as real estate, and they may call on the executors or administrators to discharge the contract out of the personal estate of A, the vendee, so as to enable the heirs to demand a conveyance from the vendor. See s. 18.

§ 13 *con.* As to past performance. See also s. 18, s. 19, and 9 Johns. R. 450 to 469. Generally, a bill for the specific performance of an agreement, is addressed to the sound judicial discretion of the court of chancery, in the exercise of its extraordinary discretion. This sound discretion is as applicable to *part* performance as performance in *toto*. A *small* defect in part, as to title or quantity, is disregarded or compensated. 6 Johns. Ch. R. 38–398; 1 Johns. Ch. R. 357.

6 Johns. Ch. R. 111–222.

Equity decrees a specific performance of a *parol* contract for the sale of lands, though there has been no partial performance, if the contract be proved by evidence as satisfactory as that which arises from a contract in writing: 2. It is no objection the purchase money is to be paid '*in the fall*,' the period is sufficiently certain.

Dash v. Bugley, 2 Murph. 38.

On a bond conditioned to convey lands, if no land, when the suit is brought, the conveyance whereof can be decreed, there can be no bill for specific performance, nor will chancery decree compensation in money, unless it appears adequate relief cannot be had at law.

Johnson v. Hobson, 1 Litt. 314.

A prayer case for compensation in damages, may be connected with a bill praying for specific performance.

1 Litt. 358.

§ 22. *Where equity will not execute, &c.* Not, where the party asking the execution of the contract, has been in fault, and the other party will, thereby, suffer a serious loss, if obliged to execute: 2. But if the contractor knew when he contracted, there was a defect in the title, and that considerable time would be required to remove the defect, or acquires this knowledge after the purchase, acquiesces in the delay, or proceeds with knowledge of the defect, in the execution of the contract, he has no cause of complaint.

4 Rand. 478–482.

§ 23. *Equity jurisdiction as to fraudulent deeds.* They are properly cognizable in equity: 2. If contested as false and fraudulent, they are ordered into court for inspection. See p. 59, Donavan *v.* Finn; p. 213, Ward *v.* Arridondo; p. 112, Vredenburgh *v.* Johnson; p. 119, Mitchell *v.* Tighe; p. 365, Moran *v.* Dawes. See ch. 187, a. 7; ch. 225, a. 6; Index, State Rights; Jurisdiction.

1 Hop. Ch. R. 143–149, Apthorpe & al. v. Comstock & al.

§ 24. A court of equity in New York, has jurisdiction to enforce a contract made in the *Havana* to convey lands in *Alabama*. It has power whenever the parties or the subject, or such a portion of the subject, are within its jurisdiction, that

1 Hop. Ch. R. 213–224, Ward v. Arridondo & others.

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an effectual decree can be made and enforced so as to do justice, as where the plt., a citizen of New York, being in the Havana, there made the contract with A, a Spanish subject, for said lands; partial payments were made, and partial conveyances were executed; deft. A, sent a conveyance for some part of the land to the deft. T., his son, his agent in N. York, to be delivered on the payment of a certain sum claimed, (larger than the plt. admitted due,) was a bill of account both of the payment made and of the lands to be conveyed, on the terms of the contract, and to restrain the defts. from withdrawing the deed out of the jurisdiction, and for relief, was an appeal from the first circuit in equity. Thomas, the son, was one holder of said deed, and a deft. The court sustained the cause, on the ground the subject was a transitory contract, and the deed was within the jurisdiction of the court, 'and that the deed is such a portion of the subject in question, that by acting upon it, the court may decide the controversy, and do complete justice between the parties. The cause was remanded, and so the decision was not final.

1 Hop. Ch. R. 32–41.

§ 25. *How equity jurisdiction is effectual, &c.*: is, to issue all process to execute its decree, as on the sale of the mortgaged premises, and if the deft. in possession will not, on being shown the master's deed, deliver up, the chancellor may order him to give possession, and if he disobey, an injunction may issue. Was, on a bill to foreclose and sell. See Kershaw *v.* Thompson, 4 Johns. Ch. R. 609.

Directs an issue to a jury as to adverse possession and the time thereof. 1 Hop. Ch. R. 36–450.

Woodcock appellant v. Bennet respondent, 1 Cowen, 712—756.

§ 26. Case in the court of errors. In this important case, the Reporter has stated more than fifty points disposed of on appeal from chancery. Facts in order of time. May 26, 1813, Benj. Pelton, sold and conveyed to Phineas Bennet, the premises in question, and received from him a mortgage thereon of $4000, to secure the consideration money. February 7, 1814, P. Bennet sold and conveyed to the respondent, Silas Bennet, an equal undivided half of the same premises. The deed was delivered to the appellant, Woodcock, to be given up to the respondent after he had satisfied the mortgage given to Pelton, and afterwards paid $1200 thereon. September 16, 1813, lot No. 94, was sold by virtue of an execution issued out of the supreme court, against Benj. Pelton, and Richard W. Pelton on a judgment docketted October 12, 1810, in favor of Walter Wood. The appellant became the purchaser for the sum of $493,62, and received a sheriff's deed. After this purchase, and till the execution was set aside for irregularity, it was considered by all parties that the appellant had

acquired a good title, and that the mortgage to Pelton would become inoperative. Phineas Bennet and the respondent rescinded their contract, and P. Bennet gave an order on Pelton in favor of the appellant, for the amount of the purchase; which order Pelton refused to accept, and has never paid, nor did the appellant attempt to enforce it by charging the drawer. The Bennets released to the appellant all their right in the premises, (being an equity of redemption) and thereon he executed the covenant to convey. Said execution, August term 1816, under which the appellant purchased, was set aside for irregularity. This the parties supposed let in B. Pelton's mortgage, then held by one Wells, as assignee. He exacted the specie. November 30, 1815, the appellant entered into articles of agreement, by which he, for $560, secured to be paid, covenanted to release and *quit claim* to Phineas Bennet, and Phineas Bennet, Jr. and the respondent, Silas Bennet, on or before December 1, 1816, the right, title, and interest of the appellant to three undivided fourth parts of a parcel of land lying in lot No. 94, at Ithica, in the town of Elyssus, subject to certain exceptions mentioned in the articles. This agreement of November 30, 1815, was never fulfilled by executing the *quit-claim*. On that agreement the respondent, October 1819, filed his bill in the court of chancery, against the appellant, for the specific performance of said articles of agreement, dated November 30, 1815. The appellant in his answer, set up that December 17, 1816, said agreement was rescinded by consent of all parties, and new articles made between the appellant and P. Bennet, and P. Bennet, Jr. containing arrangements for bidding in the premises under the mortgage, and detailing the manner in which they should be disposed of between the parties. This new arrangement was not questioned except as to the respondent by the pleadings or proofs. It was alleged by the respondent, that the appellant had fraudulently procured said articles of November 30, 1815, from one Bingham, with whom left by both parties, then the appellant destroyed them. All this he denied. January 11, 1817, the appellant got, by purchase, a conveyance in fee of the premises, under a mortgage by Wells, at $3200, which he paid. Before the filing of the bill, he had conveyed away to different persons his interest in all the premises, except about one undivided sixth part; and about $4000 had been expended in improvement by the different proprietors. The answer insisted that the respondent had abandoned all claim to the premises. No evidence he gave any notice of his claim to the parties claiming an interest in the premises after November 1, 1816, till about the time of filing his bill. Just before filing

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it, it was discovered there was another judgment in the supreme court, in favor of one Lamberson, against Benj. Pelton, docketted December 8, 1807, for $1287,68, supposed to be a lien on the premises, and under a *fi. fa.* on which they were advertised for sale. This judgment was set up in the answer; and that the appellant apprehended he should, with the other parties, in interest, be obliged to pay it. February 22, 1822, the chancellor decreed that the complainant, Bennet, was entitled to a specific performance of the articles of November 30, 1815, and that the performance consist of a release and conveyance in fee, (without warranty) of a right and title to one undivided fourth part of the premises, part of lot No. 94, &c., subject to the exceptions, &c.; but as he had only a sixth part to convey, decreed B. was entitled to compensation in damages, for the value of his claim and right under the articles; to be referred to a master to ascertain and report the value of the one equal undivided fourth part, December 1, 1816, exclusive of after improvement, &c., and interest on the value from December 1, 1816, to the making of the report. This decree in the court of errors was reversed, unanimously, and the bill of the respondent dismissed with costs, in the court of chancery; and each party paid his own costs on the appeal.

The arguments of counsel were long and able; pp. 716–733. Scores of authorities were cited by them, and the court.

From the numerous points disposed of in this complex cause, we may select, to some advantage, the following.

1. *As to consideration.* A contract will not be specificially enforced, unless supported by a valuable, or in equity, a meritorious consideration. But where a party accepts a draft for the consideration, and does not use due diligence in demanding payment, and in giving notice to the drawer, &c., he cannot resist a specific performance, because it is not paid. He makes it his own, and the contractor is not decreed to pay the money as a condition of the performance.

2. The effect of a *quit-claim.* If one agree to convey by it, his agreement refers to the title as it was *when* he agreed, not to a title *subsequently* acquired; and if the covenantor have no title when he covenants so to convey, there is nothing on which a decree for a *specific performance* can operate; and there is no equity in decreeing the title *after* acquired.

3. *Pleadings, &c.* In chancery every material allegation should be put *in issue* by the pleadings; and no interrogatories can be filed, which do not arise from, or relate to, some fact thus put in issue.

6 Johns. 543.

4. *Sale of land under execution.* A sale under a *fi. fa.* is

not avoided, though the judgment be afterwards reversed for error; so of an *erroneous fi. fa.*, as one issued after the year and a day, and no previous *sci. fa.* *Aliter*, if the *fi. fa.* be *irregularly* issued. A judgment *erroneous* is valid till reversed: is the court's act. *Irregularity* is the party's act, and when vacated is void *ab initio:* 5. So an *erroneous* execution is valid to the time of the sale under it; but one *irregular* is, when set aside, as a nullity from the beginning, even as to the *bona fide* purchaser under it. No reason appearing, irregularity is supposed. Hence, the true cause of setting aside, may be shown in evidence, as that the *fi. fa.* issued *after* the year and a day, and no previous *scire facias.* One so issued is only *erroneous* and *merely voidable, not void.* Hence, a sale under it is valid, though it be afterwards set aside. The party grieved must look to him who took out the *fi. fa.* 8 Coke, 192, 284.—2 Wils. 385.—3 do. 345.—Ch. 75, a. 4, s. 7.

6. *Joint judgment debtors.* If one of two die, execution goes against the *survivor*, or against his *personal* estate, for a judgment survives as to that: ought to issue against both defts., by name, so as to agree with the judgment; but is enforced against the survivor alone. The deceased one's personal estate is discharged at law.

7. *The real estate.* The above rules as to execution do not apply to it. Can be issued or enforced against the *survivor* and his heirs, or terretenants, &c. of the deceased only, after *scire facias* to show cause why the money should not be levied of their respective lands, not naming goods: if issued without *scire facias* it is void, and protects not an innocent purchaser under it, even as to the survivor's land. Judgment does not survive as to the *real* estate.

8. *Scire facias void and voidable.* It is a general rule there must be a *scire facias* whenever any *new person* is to be better or worse by the execution, or affected by it. Nor can it be *voidable* merely, if there be *no party* living who can avoid it. If one be living he can, on motion, arrest the sale on a *voidable* execution; but if he suffer it to go on and the land to be sold to a *bona fide* purchaser the sale is valid, though the execution be afterwards set aside.

9. *Irregularity* further. This may be in the process itself, or in the issuing it. This does not mean the process *on the face.* To be irregular, the irregularity must be stated in the writ. It may be by reference to extrinsic causes and circumstances, as the terms of the court, or the death of the party.

10. *Death of the deft.* If he die the plt. cannot have execution, without a *scire facias*, even against the person or personal estate, unless the execution is tested in the deft's. life-

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time. The act 1 R. L. 504, s. 10, giving a remedy in certain cases is new law.

11. *Answer to a bill filed.* When this is responsive to it, and within the discovery sought, it is legal evidence in all cases, whether a denial of some fact alleged by the plt., or sets up a fact by way of avoidance merely.

12. *Damages in lieu of the land.* Where it is bound by a judgment against a previous owner, and the present owner, A, covenants with B, to give him a *quit-claim* deed of an undivided part, at a day named, and this passes, and A sells it. On a bill filed by B for a specific execution, chancery ought to decree an equivalent in damages to the value of the land, but must provide B first pay or secure a proportion of the judgment, corresponding to the proportion which the share he contracted to purchase bears to the whole land bound by the judgment. Generally a master may assess the damages; and need not but under special circumstances award an issue of *quantum damnificatus*; and where a party has put it out of his power to perform specifically, yet a bill filed for a specific performance will be retained and an equivalent in damages awarded, to be assessed on a reference to a master, or to a jury on an issue of *quantum damnificatus*, according to circumstances.

13. The evidence, on the whole, proved the respondent consented to rescind the contract. Decision in favor of the appellant.

This case is abridged somewhat at large, because 1. It was thoroughly considered and finally decided in a State court of high authority: 2. It is conceived that all of it, except six or eight lines, is law and equity in twentythree States: 3. The points decided as to contracts to convey, judgments, executions and sales thereon, mortgages, considerations, *scire facias*, &c., &c. often occur.

Seymour appt. v. Delany and others, resp'ts. 3 Cowen, 445–537.

§ 27. Appeal from chancery to the court of errors. The appellant filed his bill in the court of chancery against the respondents, the real and personal representatives of Thomas Ellison deceased, to compel the specific performance of covenants to convey real estate. Bill dismissed in the court of chancery for three reasons. 1. Inadequacy of price: 2. Debility of Ellison's mind, produced by habitual intoxication: 3. The appellant's inability to fulfil on his part. Reversed in the court of errors.

Art. 6. Con.

§ 16 *con. In Maryland* the court of chancery exercises extensive powers from which an appeal lies to the court of appeals in equity cases as in others. See many cases since 1658. In Harris & Mc Henry and other books, among oth-

ers vacating grants of land, which the courts of law again examined and thereon decided as early as 1670, 1705, 1726, &c. See ch. 127, a. 10, s. 10, title in law decided.

The chancellor does not decree a specific performance of a speculating contract; nor if, since a contract was made, circumstances have so changed, as make the performance peculiarly hard. The plt. is left to his legal remedy. The chancellor refers points of law to the general court for its opinion. 3 Har. & Mc H. 220-222.

A and his wife, a *minor*, sold her lands. The purchaser erected buildings on them, thinking his title valid: she, when of age, recovered the lands. The chancellor decreed the buildings should be paid for. 3 Har. & Mc H. 128-131.

If A, by misrepresentations to the legislature, obtain its grant of too much land, the chancery court may order him to release to the State all so obtained. Nor will this court sanction the sale of a trustee to himself or to his use. 4 Har. & Mc H. 6-12, The State v. Reed.

If a distributee be deprived of his part of the personal estate, chancery decrees him an equivalent from the sale of the real estate. But it does not decree a contract to convey lands to be performed, if the quantity be mistaken. It is not a universal rule, if a man has an *adequate* remedy at law, for chancery to forbear to exercise jurisdiction. But it does not interfere where a party's case is fairly examined in a court competent to his relief. The competent court was the general court. The appeal from the chancellor was decided in the court of appeals. Chancery decrees a specific performance of a parol agreement, made sixty or seventy years ago, fully performed on both sides, except only a complete execution of a deed. Decided in the court of appeals, reversing the chancellor's decree. 4 Har. & Mc H. 12-17. Id. 4 Har. & Mc 21-38. 4 Har. & Mc H. 21-38, the Howards v. Warfield's adm'r. 4 Har. & Mc H. 43-62, Sommerville v. Trueman.

As long as the subject of trust is in the hands of the trustee, or of his heirs, chancery lays hold of it for the benefit of the *cestui que trust*, or view it as his, if converted into money by an executor.

When a contract is even admitted, a court of chancery will exercise its sound discretion as to directing its execution or performance; and equity directs not legal estates, where the facts on which it arises are much disputed, till they are established by verdict. 4 Har. & Mc H. 198. 4 Har. & Mc H. 252, &c. Simmons v. Hill.

§ 52. *Executor liable for duties on his probate bond.* A bill in equity brought by the United States against the deft. sole acting executor of Samuel Aborn deceased, against the sureties of the same executor on his probate bond, and against the heirs and devisees of the testator, and against Edward Carrington to whom the said Daniel T. Aborn had assigned and conveyed Id. 3 Mason, 126-131, United States v. Daniel T. Aborn & al.

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all his estate, the bill charged that Daniel T. Aborn was insolvent and had wasted the personal estate of the testator; that at his death he owned certain merchandise on board of the ship Midas, which afterwards arrived at Salem in Massachusetts, and was there regularly entered at the custom house by Daniel T. Aborn, as executor, who gave bonds for the payment of the duties thereon, as executor, one of which bonds remained due. The object of the bill was to obtain payment of the bond ($580,) from some or all the parties to the bill, according to the order in which they might be liable by law. The defts. put in several answers. One alleged that Samuel Ropes, the surety in the custom house bond, was alive and solvent, and the remedy was against him, &c. E. Carrington admitted the conveyance to him, but asserted he was a *bona fide* purchaser, for a valuable consideration, without notice.

Held, 1. The executor, by his custom house bond, bound the estate of the testator: 2. The executor being insolvent, the United States may, in equity, claim payment of the duties due to them from the sureties in the probate bond where the executor has wasted the estate: 3. Not obliged, in the first instance to resort to said Ropes. As to binding the estate of the testator, the court seemed to go on the ground the goods were a part of his estate, and the duties a lien upon them, and if the executor bound himself individually, he did 'not necessarily exonerate the estate;' and if Ropes had paid the custom house bond, he would have had a remedy against the estate of the testator. See the United States *v.* Lyman, cites Riddle *v.* Mandeville, 5 Cranch, 322; 7 Johns. Ch. R. 208.

3 Mason, 178–231, Gardner & al. *v.* Gardner.

§ 53. A bill in equity. A devised to one of his sons in fee two thirds of his certain farm, '*he paying all my just debts out of said estate.*' Held, the debts were a charge on the estate devised as well as on the devisee: 2. The charge being for the payment of debts generally, a *bona fide* purchaser, from the devisee, who has paid his purchase money, is not bound to look to the application of it: 3. If the purchase money be unpaid it may be followed into the hands of the purchaser. How the purchaser is bound to see to the application of the purchase money to pay debts, &c. see ch. 114, a. 16, s. 6.

Whelan *v.* Whelan & al. 2 Cowen, 537–590.

§ 54. Setting aside a conveyance. A father, seventyfour years old, having a wife and seven children, and living in discord, the wife and five of the children separated, leaving two sons (the respondents) taking part with him. He conveyed to these sons most of his estate—eight to ten thousand dollars in value. They, by bond and mortgage, securing the

maintenance of him and his wife, and allowing also an annuity of $50. Soon after the father filed his bill in chancery to have the conveyance set aside (dated January 19, 1821,) obtained, as alleged, by undue influence and fraudulent representations, &c. The chancellor, after examining numerous witnesses, as to family dissensions, undue influence, false representations, said to have been made by the two sons, and their father's imbecility of mind, dismissed the father's, the appellant's bill, and held the conveyances valid, 'unless they were obtained by fraud.' He observed the answer of the respondents denied all fraud; and after a careful consideration of the proofs taken in the cause, the chancellor said, 'I am of opinion that no fraud is proved.' Thus placing a cause, (occupying fiftythree pages,) on a question of fact if fraud had been practised or not. The father appealed to the court of errors. Decree reversed, twentythree to seven. In the court of errors the father was allowed to prosecute in *forma pauperis*. Woodworth, J. *inferred fraud and imposition* from the son's conduct, and, on the whole, on this ground was the reversal, as also for undue influence. Reconveyance decreed.

ART. 7. *Con.*

§ 5 *con. A mistake in law* merely relieved against, in equity. Three obligors gave a joint bond to Dr Burn, where meant to be severally bound to secure to him a large debt; one obligor died, and equity allowed the bond to be considered joint and several, and Dr Burn to be a *specialty* creditor to the estate of the deceased obligor; and cases cited.

Burn v. Burn. 3 Ves. Jr. 573–583.

In this case, Rousmanier owed Hunt a debt, and the parties meant he should have good collateral security on two vessels R. owned. They consulted counsel as to the security, and he, mistaking the law, thought a power of attorney from R. to H. to sell them to pay his debt, was better than a mortgage of them. R. gave such power irrevocable, but the power was not exercised by Hunt, before R. died, and held, by his death it became void. Judge Story thought Hunt not entitled to relief in equity, on account of this mistake in law, but the supreme court of the United States thought differently, and held, Hunt entitled to relief, relied on. Burn *v.* Burn, cited above; Underhill *v.* Howard, 10 Ves. 209–228; Simpson *v.* Vaughan, 2 Atk. 33; cited ch. 225, a. 7, s. 3; Sumner *v.* Powell. 2 Merw. 36; Landsdown *v.* Landsdown and Mosely, 364, cited ch. 225, a. 6, s. 37. Equity can correct a mistake of the law. 1 Bro. ch. 6, 91.

8 Wheat. 174–216, Hunt v. Rousmanier's administrators.

2 Mason, 244.

8 Wheat. 201–216.

Where the fraud is in the inducement to the deed, and affects it but in part, equity alone, has jurisdiction to relieve: law has, if the fraud be in the execution.

Thomas v. Thomas, 1 Litt. 63.

§ 9. *Case of undue influence on a weak mind.* This was

2 Mason, 378–392, Harding v. Wheaton.

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a bill in eqnity by two of the heirs of Comfort Wheaton, deceased, charging that May 9, 1805, he was seised of a certain real estate, in Providence, that he was then infirm and weak, in body and mind, being seventyfive years old, stating he had had a severe stroke of thepa lsy, &c., and a deed obtained of him, &c. Held, 1, A court of equity has jurisdiction to entertain a suit, on the application of heirs at law, to set aside a deed of land obtained from their ancestor by undue influence, he being so weak in mind and body, as to be open to such influence, though not absolutely insane: 2. So is the case, when one of the heirs has, with the assent of the others, taken such a deed, on an arrangement that the same shall be considered as a trust for the maintenance of the father, and after his death, for the benefit of all his heirs: 3. Under circumstances, such a conveyance may be allowed to stand security for actual advances and charges, and be set aside as to all other purposes, on account of imposition. There was an objection to the jurisdiction, on the ground there was a remedy at law. (Act of congress, September 24, 1789.) But could a court of law let the deed stand in part, and in part set it aside, as was done in this case, in a manner justice and equity required? Because it is evident the imposition mingled with family intentions, proper, and to be sanctioned, as far as their objects were, to prevent the father wasting his estate, to prevent his being put under guardianship, and to provide for his support. But beyond these objects, the intentions and transactions were fraudulent, so to be set aside in equity. For holding a deed good to cover advances and void for the rest, see How *v.* Weldon, 2 Ves. 516.

Rosevelt appellant *v.* Dale & wife, executors of Robert Fulton, Rep'ts. 2 Cowen, 129–189.

§ 10. ***Mistake as to a coal mine in land sold.*** In the court of errors; appeal from the court of chancery. Fulton purchased of Rosevelt a tract of land on the bank of the river Ohio. R. representing and believing it contained a valuable coal mine, paid $4400; and further, F. covenanted to pay R. $1000 annuity, for twenty years; this to cease, if, after the mine was faithfully worked by F., should not yield a certain quantity of coal; land conveyed, &c. It turned out there was no such mine as R. represented. It did not appear R. had been guilty of any fraud, yet decreed, 1. A perpetual injunction issue, to restrain his suing at law for the annuity: 2. As there was no such mine, F. need not work the mine in order to determine the quantity of coals: 3. Relief can be had in equity against any deed, or contract in writing, founded in mistake, whether it be set up affirmatively, by bill or as a defence: 4. The mistake may be shown by parol. Decree for an injunction affirmed by Woodsworth and Sutherland, and

seventeen senators. Savage, C. J. and five senators, held, it ought to be reversed, and holding Fulton was sufficiently informed before he purchased, to take the risk and chance on himself. The real question if so informed, seems to have been proper for an issue. Power to correct mistakes in contracts. 17 Johns. 373, Lyman *v.* United States Insurance Company; on appeal; 1 Hop. Ch. R. 271; 4 Johns. Ch. R. 659; 14 Johns. R. 15.

§ 11. *Bill for relief against undue advantages taken of the necessities of a debtor.* Appeal from the court of chancery; to the court of errors. Neilson filed his bill in chancery against the appellants. One object to set aside a bond and mortgage for $2500, given by N. to M'D. on the ground these securities had been given to avoid a forced, oppressive, and illegal sale of N's. property on execution against him. The securities covered N's. debt, also, a large debt due from his insolvent son. Many points were decided and opinions given. Material ones: 1. A party charged as combining with others in a fraud, as to which relief is sought, so is made a deft., but no relief is prayed for as to him, so liable only to costs, and these contingent, is a competent witness for his co-defts, and the objection is to his credit: 2. Equity holds a sale oppressive, is illegal: 3. Securities when oppressively obtained must be given up, except to stand security for the just debts, that is, the amount due on the execution with interest and costs, and other debts due to the creditor from the debtor only in equity: 4. If it appear a bond and mortgage be given for a full and adequate consideration, and on the whole are reasonable, the court will not interfere, especially where the debtor has delayed all objection to the security, so long that the creditor cannot be reinstated in his original rights: 5. A party asking equity must do equity: 6. A sheriff is not bound to obey the instructions of a party in executing a *fi. fa.*, if he see it will produce a great sacrifice of property; but should rather postpone the sale: 7. As to the time, place, and manner of the sale, he is vested with a sound discretion. On the whole, the sale was most oppressively conducted, (said one of the judges.) Specie alone, was demanded of the debtor, time to send three miles for the money, refused to Neilson, a man worth twenty or thirty times the amount of the execution. His personal property not in his house, worth from $1200 to $2000, sold for $300, and the officer proceeding forthwith into the house to sell the furniture, and all this to compel N. to assume to pay his son's debt to McDonald. The appellants, who combined together in the affair, were the principal purchasers at the officer's sale, so rendered it void, then giving

McDonald & al. appellants, v. Neilson respellant.

Same Case, 6 Johns. Ch. R. 201, 212, 213.

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up the goods so purchased, was no consideration for the bond and mortgage, as the giving up might have been, if the sale had been legal and valid. Savage, C. J. differed; he doubted the combination. Though he thought McD. and the officer conducted oppressively, he excused them. The officer, because though mistaken, he thought he was bound to obey McDonald's instructions; and McDonald, because, in the opinion of the chief justice, he was provoked to do what he did, by Neilson's conduct in his son's affairs. And on the whole, he held, there was a sufficient consideration for the bond and mortgage. This consisted mainly in large demands, such as they were, McDonald released to Neilson and his son, when he took the bond and mortgage. Eleven senators, with Woodworth and Sutherland, justices, were for reversing the chancellor's decree, but in part. Sixteen senators, with the chief justice, were for reversing it into *toto*. All the judges who expressed opinions, agreed in the principles above stated; but differed in applying them, and, as is often the case, when there are numerous facts in a case, and grounds of intendment, some rely most on one part, some on another.

ART. 13. *Con.*

§ 1. *North Carolina.* A citizen is not sent out of the State to seek redress at law. As where A, by will made in N. C., appointed four executors; two of them in Tennessee, and devised certain lands in Tennessee to his nephews and nieces, directing his executors, previous to a division of these lands among them, to raise from them money enough to pay all his debts; and to sell the rest, and the proceeds he bequeathed to the plt. On a bill filed against the executors and devisees, showing the acting executors in N. Carolina had applied a portion of the plt's. residue to pay the testator's debts, and praying the lands charged might be sold, and she reimbursed. Held, that as the lands were without the limits of N. Carolina, no decree could be made by a court of chancery in N. Carolina, against the acting executors in N. Carolina, to sell these lands. A, citizen of Virginia, sold a horse to B, a citizen of N. Carolina, and made a false and fraudulent representation of his pedigree. B gave his bond for the price, and was sued on it, and judgment against him. He filed his bill, charging fraud, and praying for an injunction; granted. A demurred to the bill, and showed for cause, that it appeared from the plt's. own showing, he had relief at law. The demurrer was overruled on two grounds: 1. A resides in another State, and B ought not to be sent beyond the jurisdiction of the courts of his own State, to seek relief: 2. It being a case of fraud, a court of equity will take cognizance of it, and at once save the plt. from an equitous recovery at law.

Blount v. Blount, 1 Hawks, 305. 2 Murph. 273, Bell v. Buman.

The statute 43 Eliz. ch. 4, is in force in N. Carolina, and the court of equity, by virtue of it, has jurisdiction of all charities. Griffith *v.* Graham, 1 Ruff. 47.

The rule that equity interferes by *ne exeat*, only in cases of equitable demands, applies where *money*, not *property*, is the subject of controversy. Edward *v.* Massey, 1 Hawks, 359.

A court of equity has no jurisdiction of a widow's claim to a distributive share, there being no charge of *fraud* against the executor: 2. Equity will not interfere, where a court of law can give complete redress. 1 Hayw. 233–367; other cases; 2 Murph. 207; 1 Car. Law R. 362; 2 do. 466. Though these decisions were made in N. Carolina, it is believed they are such as are made in the other States in similar cases. Jones *v.* Jones, 1 Murph, 96.

§ 2. *Kentucky.* The power of chancery over infants, and their estates, is only *judicial.* Hence on applications in their behalf, the court does not give an opinion as to the legality or propriety of *contemplated* acts: 2. Its opinion thereon for advice, is not a decree, and therefore no appeal or writ of error lies. 2 Litt. 97.

A bill in equity lies to quiet the possession of real estate, if the plt. has title, without having had his title previously tried in a suit at law. 1 Litt. 147. Trustees, &c. *v.* Gray.

Though chancery has no jurisdiction to liquidate damages, for a defect in personal property sold, and then set off the damages against the price, yet if the parties agree the amount and that this be discounted against so much of the price, equity may enforce the set-off. 1 Litt. 212.

Chancery has jurisdiction in favor of the party injured by the loss of an article of agreement, in which are mutual covenants. 1 Litt. 125, Bolivar *v.* Bolivar.

Chancery has no jurisdiction to compensate a vendee, evicted by title paramount, nor to interfere in the sale of slaves on execution, unless some facts show there is not an adequate remedy at law. Chancery has jurisdiction to relieve against fraudulent devisees. 1 Marsh. 457, Lawless *v.* Helm. 4 Bibb, 235.—1 Marsh. 396.

Chancery and law have concurrent jurisdiction in making partition among tenants in common. 3 Marsh. 288.

Chancery has no jurisdiction where the case respects personal chattels and sounds merely in damages, which are properly assessed by a jury, but has jurisdiction, where a *fraud* has been committed in selling it, to vacate the contract *in toto*; but not when the injured party claims only a ratable deduction as then the remedy is at law, and the deduction in the jury's discretion. 1 Bibb, 212

Chancery will exercise jurisdiction when that and law courts have concurrent jurisdiction, though the defence may 3 Bibb, 248, Clay *v.* Fry.

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be made at law. The party may elect his court in such case. 2 Bibb, 4.

A plt., though he has an action at law for breach of covenant, may elect to resort to equity for *specific* performance, and may pray for this, or that the contract be dissolved. Mills v. Metcalf, 1 Marsh, 477.

1 Marsh. 466. Even in cases of discovery chancery will not exercise jurisdiction in which there is matter proper for a jury.

§ 3. *Tennessee.* Equity has no jurisdiction where the party has a plain, adequate, and unembarrassed relief at law; but alone has jurisdiction where a bond is lost. One who has law and equity on his side, prevails in equity against him who has equity only. It seems, if on the face of the proceedings, that both parties are citizens of *another* State, and the contract made in that State, equity has not jurisdiction.

Williams v. Patterson, 2 Tenn. Rep. 229.

p. 308.

p. 295, Barry v. Deloach.

Avery v. Holland, 2 Tenn. R. 71.

Cooke's R. 36. After a fair trial at law equity cannot relieve.

Armstrong v. Thompson, 3 Hayw. 127.

4 do. 7.

It seems the strict English rule as to relief, where a party might have defended himself at law, is not applicable to the law proceedings in Tennessee. In Tennessee the courts of equity *depart from the English rule*, and relieve a deft., though he has had a good defence at law, but by some mistake of his counsel his pleadings failed to bring the matter of defence properly forward.

Winchester v. Jackson, 3 Hayw. 315.

The courts of equity of one State may by bill *quia timet* relieve against the judgment of another State, when it is not attempted to be enforced in the former State.

Glasgow v. Lowther, Cooke, 464.

So equity in one State may examine a decree in equity of another State, and relieve, if it appears the deft. had not proper notice, or had not justice done him. Equity in Tennessee

3 Hayw. 313-316.

goes on the ground that a judgment in another State may be relieved against as a judgment in Tennessee may be, and by a Tennessee court.

Cooke, 328.

Equity has no jurisdiction of a debtor's property, fraudulently conveyed away, against the possessor, until a judgment at law has been obtained against the debtor.

4 Hayw. 224.

Chancery does not exercise jurisdiction to decree an account of timber cut on land, before the plt. has established his title to it at law.

1 Tenn. Rep. 71.

p. 82.

According to the practice in Tennessee a bill taken *pro confesso* is considered as being true, as to all matters of fact: Where so the plt. is not held to prove the contract as stated in his bill.

It may be observed, chancery in Tennessee, as in North Carolina and Kentucky, as in some other States, departs from the English system of equity in some cases, but generally adheres to it. These departures are often produced by *State*

statutes, especially in Kentucky; but it is clear all the State chancery courts use principally English chancery and equity authorities.

CHAPTER CCXXVI.

PLEADINS IN EQUITY.

ART. 2. *Con.*

§ 2 *con.* And the bill must clearly state, the persons who are defts. by praying process against them, or by a distinct allegation designating the persons impleaded *as defts.* On this omission there was a demurrer to the bill; those only are defts. against whom process is prayed. 1 Hop. Ch. R. 555–556.

§ 7 *con.* Chancery can aid a judgment and execution creditor, to discover and reach property of the debtor, in whosesoever hands it has been placed, out of the reach of an execution at law. Hodden *v.* Spader, on appeal, 20 Johns. R. 554. And it matters not whether the property be *choses in action*, *money*, or *stock*, for the court can compel the debtor or his trustee to pay it over to the creditor, and can direct the transfer and sale of the stock, for the benefit of the creditors. 20 Johns. R. 554; 5 Johns. Ch. R. 280, Spader *v.* Davis.

An answer to a bill of *discovery* is evidence for the deft. till disproved. A bill seeking *discovery* and relief on a lost paper, must be supported by affidavit. Cooke, 36, the plt's. bill of discovery ought to be dismissed where the deft. denies the allegations in it. 10 Johns. R. 524, Parsons *v.* Wilson; 2 Tennessee R. 260.

§ 10 *con.* An amended bill takes date from the filing, and if that be after a cross bill, that must be first answered; and, Perkins *v.* Hays, Cooke, 189, the court will permit amendments of a bill in equity, at any stage of the cause, even after argued, if it appears justice cannot be fully done without it. 3 Hayw. (Tenn.) 229.

§ 14. A person having a common right against many other persons, may file a bill against some of them, and, if the right be fairly established, the court will carry the decree into execution against other persons not parties to the suit. 1 Jacob & W. 369.

But one having no interest is not to be made a party, though once interested; as where the mortgagee, even in possession, *absolutely* assigns all his interest and estate, he need not be a party, either to a bill for foreclosure and sale, or to redeem. As the assignee stands in his place, he may be decreed to convey. 7 Johns. Ch. R. 144, Whitney *v.* Mc Kinney.

The deft. was a trustee for himself and other creditors of the assignors who signed the deed. Held, after the lapse of twenty years, the deft. could not object on a bill to account that the other *cestui que trusts* were not made parties. Mumford *v.* Murray, 6 Johns. Ch. R. 1.

The plts. may file a bill against several persons as to matters of the same nature, forming a connected series of acts all in- Brincheroff *v.* Brown, 6 Johns. Ch. R. 189.

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6 Johns. Ch. R. 398.

tended to injure the plts. and defraud them, and in which the defts. were more or less concerned, though not jointly, in each act. Where the tenant in fee dies, his heirs must be parties. A judgment is a *lien* on several pieces of land owned by several persons. One pays it; all the persons interested in the land, bound by the judgment, must be made parties, before contribution will be decreed or enforced against them. If A contract to convey land to B, and on his bill for specific performance, A's administrators assign the land to B, A's heirs must be parties.

Parties having one interest to be joined, &c. Fellows impleaded with three others, defts., below, appts. *v.* A. Fellows, administratrix, and J. Fellows, admr. of E. Fellows, deceased. Appeal from chancery to the court of errors. The bill charged that the several defts. combined among themselves, and with the debtor of the complainants, against whom they obtained decrees for their debts, to defraud them by taking conveyances to each in separate parcels, of all his estate, without consideration; and intending to avoid execution on the decree; that they so received such conveyances, which property they held for him, or for their own use. To this bill one of the deft's. answered, denying the combination between himself and the other several alienees of the debtor's property, and demurred to the rest of the bill, because it was for several distinct matters and causes; in many of which the deft. so answering and demurring, was not interested or concerned. Held, 1. The defts. were properly joined, and demurrer overruled: 2. So held, because there was one connected interest centering in the point in issue, in the cause, or one common point of litigation, as that the joinder tended to prevent multiplicity of suits: 3. An administrator who purchases land on a judgment or decree in favour of his intestate, holds it as a trustee, and may be compelled to account for the land itself, to his *cestui que trust.*

§ 22. A court of chancery has jurisdiction in all cases where a discovery appears to be necessary, and the plt. has a right to demand it. Pryor *v.* Adams, 1 Call, 382. If it appear not necessary in the bill itself, the deft., may demur to it. id. 2 Hen. & M. 8. But it lies only in cases where the plt's. right cannot be established without the discovery sought for. Bass *v.* Bass, 4 Hen. & M. 478.

Art. 5. *Con.*

1 Hop. Ch. R. 112.

§ 29 *con.* Chancery has *jurisdiction* if the amount in controversy £10 stirling. p. 119, has not, if the interest in question be but $35, though the principal in the mortgage sought to be foreclosed be $500; not appearing, the court will order the principal to be paid; that not being due or payable, £10 stirling is the rule in England, with the exceptions of cases of fraud, rights to be established, and very difficult cases.

Held, 1. All questions as to the possession and forfeiture of

charter rights, are exclusively at law. pp. 365–368, chancery has no *jurisdiction* to restrain a deft. in a suit at law, after verdict against him, and before judgment, from alienating his property, though he means to defeat the judgment. His intention to convert his property into money, comes not within the laws as to fraudulent conveyances. Verdict, $9000 for crim. con. The attempt was to raise a *lien* on the deft's. estate, not known in law. See 2 John. Ch. R. 144.

VOL. VII. CH. 226. *Art.* 5. *Con.*

1 Hop. Ch. R. 354–362, Attorney general, v. Bank of Niagara.

§ 30 *con.* The court, (Mass.) has power to decree specific performance of a bond, with a penalty conditioned for the conveyance of land: 2. If to the obligee or his appointee, it may be assigned after forfeiture, and the assignee may have specific performance: 3. Nor can the obligors question the assignment, for want of consideration.

4 Pick. 1–5, Ensign v. Kellogg & al.

§ 19 *con. Limitations, at law, how adopted in equity.* 10 Wheat. 152–181, Elmendorf, appt. *v.* Taylor and others. Appeal from the circuit court in Kentucky. Held, though the acts of limitations do not, in terms, apply in courts of equity, yet by analogy, the time which bars ejectment, &c. at law, will bar relief in equity, as an *adverse* possession of twenty years.

Art. 6. *Con.*

§ 21. Bill for an account and discovery, as to goods jointly purchased by the parties, and sold, and payment received by Murry & al. Plea, the statute of limitations, &c.: overruled because a *trust* case; and the defts. were ordered to put in a full and complete answer. Decided he will not be allowed to repeat in his second answer the same matter contained in his overruled plea, though he add matter in his second answer sufficient to sustain the defence on the statute: but he must put in a full and perfect answer. However, the decisions in chancery were confirmed in the court of errors, by two judges, and a majority of senators. Savage, C. J., and three senators, for reversing. He made three questions: 1. The plea being overruled, could the appellants '*insist on the same matter by way of answer?*' 2. If they answer at all, were they bound to answer fully? and 3. Does the answer contain matter which bars the relief sought? and answers, pages 636 to 644, 1. Could so insist on the same matter, &c.: 2. May answer in part: 3. And mainly, 'the answer under consideration contains a complete defence to the complaint of the respondents.' Were not his the better opinions?

ART. 7. *Con.*

Murry & al. ap'ts. v. Coster & als. resp'dts. 4 Cowen, 617–644.

§ 3 *con. Where a new hearing on a supplementary bill.* A sues B, and they are at issue, and proofs taken, and afterwards, by such bill C was made deft. The cause was heard without any further proof, and a decree made against both B and C. This decree was reversed in the court of errors, and the cause remitted to the court of chancery. Here the cause was reinstated and opened to proof between the plt., and C, the new deft. When the court of errors remitted the cause, it gave

ART. 9. *Con.*

Hop. Ch. R. 576–579.

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no direction as to what after proceedings should take place. See 4 Cowen's R. 667.

Hopkins impleaded with Carpenter, app't, v. Mc Larin, resp't. 4 Cowen, 667-684.

Supplemental bill in case of a mortgage. Appeal from the court of chancery to the court of errors. Jan. 4, 1816, one Cook mortgaged the estate to Hopkins. Feb. 13, 1816, Mc Larin recovered judgment against Cook for $122 8 cts., and sued out a *fi fa*, and bought the estate at auction thereon, for $126 38 cts., and took a sheriff's deed July 8, 1816. April 1, 1818, she filed her bill against Carpenter, to redeem, stating said facts, and further, that this mortgage had been paid to Hopkins; that Jan. 2, 1817, Hopkins assigned the mortgage to Carpenter, after it was paid, and he had notice thereof; that on this ground, the respondent recovered in ejectment against Carpenter. The bill then sought a discovery by special interrogatory, whether the mortgage had been paid: prayed a subpœna against Carpenter alone, and alleged, he had advertised to sell the estate under a power in the mortgage, and prayed an injunction against the sale, and general relief. Assignee answered; and on hearing, it was discovered, the assignment was conditional, and for breach thereof since the bill was filed, the mortgage had been delivered to Hopkins; thereon, he was made a party by *supplemental* bill; on which he answered both bills at large, denying payment of the mortgage; to which the plt. put in a general replication, and brought the cause to a hearing without taking any proofs, as between her and the mortgagee. Held, 1. The facts stated in his answer must be taken, on the hearing, as true: 2. That he was not affected by the proof taken between her and Carpenter, but should have been allowed to prove the truth of his answer: 3. He was not concluded by the recovery in ejectment: 4. The *supplemental* bill being of the nature of an *original* bill, entitled him to a new defence.

1 Hop. Ch. R. 272—274, Thompson v. Ebbetts and Welsh.

Bill of *interpleader:* complainant being assessed for the the same personal estate in two counties. Held, that a bill of interpleader against the two collectors is proper; and the plt. having paid into court the amount of the highest tax, he was dismissed, with costs from the fund, after both defts. had answered, admitting the complainant's allegations. The plt. moved the *tax* day, June 5, 1823, the highest tax was $142 on $35,000; his personal estate, as estimated in Duchess county: $126 on $20,000, as estimated in the city of New York: the plt. offered to pay either, and to bring the money into court, and prayed the two collectors might interplead, &c. On filing the plt's. bill, an injunction issued to restrain both collectors from collecting the taxes. Another such bill; four parties claimed one thing.

8 Wheat. 268—298.

4 Pick. 139—142, Putnam & al. v. Putnam.

Bill of revivor. A bill in equity to redeem mortgaged premises, is abated by the death of the complainant, his heirs may renew by this bill.

§ 4 *con. Interpleader.* Manks held a sum of money, and Atkinson and Holroyd, each claimed it. Manks filed his bill of interpleader: many points were decided; but in the main, the proceedings in principle were as in Thompson *v.* Ebbets & al., above. The principal question argued and decided, was, if the bill of Manks was properly filed; decided it was, and he had his costs. The 'matters of the allegations in every bill of *interpleader* are, 1. That two or more persons have preferred a claim against the complainant: 2. That they claim the same thing: 3. That the complainant has no beneficial interest in the thing claimed; and 4. That he cannot determine without hazard to himself, to which of the defts. the thing of right belongs.'

VOL. VII. CH. 226. *Art.* 9. *Con.* Atkinson app't. *v.* Mank and Holroyd, resp'dts., 1 Cowen, 681—710.

Among the very numerous points stated in this case, by the reporter, the following, relating to the bill of *interpleader*, may be selected to some advantage. 1. The complainant was interested, in no decree in the case, but that which directed his bill to be filed: 2. This was final on the statute 1 R. L. 134, s. 90, so an appeal lay: 3. It must appear that he cannot determine the right without hazard to himself: 4. He must make affidavit that he does not collude with either party: 5. He must bring the money or thing claimed into court: 6. As to him the amount or origin of the thing is not an object of inquiry, but in reference to fraud or collusions on his part: 7. But may be material as between the interpleaders: 8. If a bill of *interpleader* be properly filed, the complainant is entitled to his costs, to be allowed out of the fund in court.

§ 7. *Chancellor's interest, &c.* A *bill of review* will not be sustained on the ground the chancellor who made the decree, was interested in the stock of the complainant's corporation, if the decree was by consent, or merely formal, so that he did not personally exercise his judgment in it: 2. Nor will it be sustained for newly discovered matter of error in the proceedings, which the party, with ordinary diligence, might have before discovered: 3. Nor unless the complainant shows himself aggrieved by the decree. This was before C. J. Savage: the chancellor was a stockholder in the Albany Insurance Company, and had declined to hear the cause. 4. A bill of *review* is in the nature of a writ of error, and lies to reverse a decree: lies but in two cases: 1. For error in law, appearing in the decree itself: 2. On discovery of new matter of fact, material to the subject matter of the decree.

ART. 11. *Con.* 1 Hop. Ch. R. 102. pp. 1–6, and 102–106.

§ 8. *How limited as to time.* Though bills of review are not strictly within the statute of limitation, the courts of equity will adopt the analogy of the statute in prescribing the time in which they shall be brought: 2. Appeals in equity causes being limited by the judiciary act of 1789, ch. 20, s. 22, &c., to five years after the decree: hence, this period is applied to bills of review.

10 Wheat. 146—152.

Vol. VII. Ch. 226. *Art.* 12. *Con.*

§ 9 *con.* 10 Wheat. 502–505, Palmyra's Case. An appeal only on a final decree.

§ 21. A decree must be supported by the allegations of the parties, as well as by the proofs in the cause, and cannot be founded on a fact not put in issue by the pleadings. 10 Wheat. 181–192, Banks *v.* Carneal.

7 Johns. Ch. R. 1.

§ 22. *Decree of dismissal* of one bill, to be a bar to another, must be on the same point or matter, and the new bill must be between the same parties or their representatives.

Art. 13. *Con.*

p. 157; Ves. 133. Eden, 122; 1 Dick. 210.

§ 1 *con.* Injunctions issued to restrain: 1. A purchaser got into possession before he paid the purchase money from cutting timber: 2 The heir in the case of an executor's devise, till the contingency takes place, on which the devised estate was to vest: 3. A Tenant for life, without impeachment for waste, when he commits waste in a manner *malicious*, *wilful*, *wanton*, *extravagant*, *&c.*, Eden, 127, and cases cited, and pp. 128, 129: 4. Such a tenant wasting trees *planted* for ornament, Eden, 130, 131, and cases cited: 5. Tenant for life, impeachable for waste, where it is by *collusion* with the tenant in possession. Hence, an injunction was granted where A was tenant for life, remainder to B for life *without impeachment of waste*, and B, by A's leave, entered and cut timber: the same law if tenant for life, and the remainderman in fee, subject to contingent estates, fell timber *in collusion*.

Eden, 134; 1 Dick. 209.

id.

7 Ves. 308, 15, 138; Eden, 136–138. pp. 139, 141, 142; 18 Ves. 355.

So chancery *enjoins* in matters of trespass, where irreparable damages must be the consequence, as the ruin of the property, as of a mine, and where it is a species of trade; but not where the plt's title is denied by the answer. So chancery issues an injunction to prevent waste in a breach of covenant to manage a farm in a husbandmanlike manner.

Of special injunctions and interlocutory orders in the nature of injunctions: 1. To restrain the sale of an estate, Eden, 209: 2. Conveyance of legal estate, p. 210: purchasers not to pay purchase money, id.: one to negotiate a bill of exchange. id.: the transfer of stock, p. 211: husband's assigning wife's equitable property, p. 212: selling her term after a divorce, *a mensa et thoro*, p. 213: intercourse with a ward, id.: father's interfering with his child's education, p. 214: sailing of a ship, id.: assignees from making dividend in removal of timber wrongfully cut, id.: executor wasting assets, p. 215: partner from intermeddling with partnership effects, p. 220: from dissolving partnership, p. 221: breach of covenant, id.: solicitor from acting for a party in a suit, p. 224: a person from publishing a work, or carrying on a trade in another's name, p. 226: canal diggers from proceeding, with short funds, p. 227: numerous cases cited. Interpleading, pp. 243 to 248: forms of injunctions, pp. 263 to 272.

Where an injunction issues to enjoin judgment at law, it is sufficient to direct the bond to be conditioned according to law; but in all other cases, the chancellor must direct the particular form of the condition. Stevenson *v.* Milles, 2 Litt. 312.

Ashby *v.* Pureman, 3 Litt. 6. If the injunction bond only secures the costs and damages, the sureties are not held for the payment of the amount of the judgment. 1 Litt. 414.

A and B entered into mutual and independent covenants. A not having performed on his part, got judgment against B, on his part. B then filed his bill, charging A was *insolvent*. A perpetual injunction was decreed, except as to any *surplus* due from B to A on the contract. p. 36. When a judgment is enjoined, obtained on a verdict procured by improper practices with the jury, the court of chancery will direct an issue to ascertain the correctness of the amount of the plt's. demand. 1 Tenn. Rep. 39, Hamlin v. Berry.

§ 12. The common *injunction* to stay proceedings at law, does not extend to a distress for rent. One to restrain a deft. from communicating certain receipts for medicines, and vending them, was granted, on the ground he had obtained a knowledge of the mode of preparing them, by a breach of trust. 1 Jacob & W. 392. p. 394.

§ 13. So another *injunction* was granted to restrain the performance of a comedy, the copyright of which had been sold by the author, and afterwards assigned by writing to the plts. though it did not appear, whether the original asssignment was in writing or not. The court of king's bench had decided that the copyright cannot pass, except by writing. Injunction was granted, on producing an affidavit of that fact: no positive affidavit produced, but evidence that made it probable the assignment was in writing. The lord chancelor said, 'I shall assume that the title is regular, until they show the contrary.' 1 Jacob & W. 461. Power v. Walker, 3 Maule & Selw. 7.

§ 14. *Injunction* granted to restrain payment by a friendly society, founded on erroneous principles, tending to exhaust its funds. One to restrain the sailing of a vessel, containing goods sold to a person who had become insolvent, but over which, the plt. retained a right of stoppage *in transitu*, refused, because it seems a court of equity has not jurisdiction in any case, to stop goods *in transitu*. The chancellor suggested, that there might be on board, a vast deal of other property that ought not to be stopped, and said, 'it is too much to expect the court to take care of the property of persons, who will not take care of themselves,' alluding to the plt's. delivering his property without pay or security. 2 Jacob & W. 390, Goodhart v. Lowe. p. 349.

§ 15. 2 Jacob & W. 224–226, held, an *injunction* is not granted to restrain a breach of covenant in articles of partnership, which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. A deft. was committed for the breach of an injunction after

Vol. VII. Ch. 226. notice of its having been obtained, though the order for the injunction had not been served.

Art. 14. Con. § 6. *Ne exeat regno*—when of right. Is of right in a proper case, and not discretionary. Citizens of other States and aliens are subject to it while in New York, &c. Chancery determines the amount in which the deft. shall be held to bail, and the sheriff must take the bond in the amount directed, as the penal sum. The deft. was a citizen of Baltimore. But the affidavit of the debt must be positive, if not admitted by the answer of the deft. The condition of the bond is, that the deft. shall not depart from the State, without the leave of the court.

1 Hop. Ch. R. 486-491.

1 Jacob & W. 466. § 7. One granted at the suit of a subject against an alien generally residing and carrying on business in partnership in a foreign city, but temporarily; where the writ issues on a balance of accounts, as to goods consigned to him and partner; will not be granted on account of a sum not ascertained. The court ever hears a deft. moving to discharge him, but it is enough there be reasonable grounds to think the plt. will prevail in his suit. Not discharged from arrest, if for a debt of the same nature in the foreign country, there is no arrest, where one of the parties is a native and was resident where the writ issues. Granted against an obligor in a bond given to trustees, at the suit of a party having a beneficial interest in the money secured by the bond.

p. 585.

§ 8. The affidavit to obtain the writ must be positive, though it concern a matter of account, *that the party is indebted*, though the plt. need not answer to the exact sum, but only according to his belief as to the amount; and if the deft. put in an answer to the bill, though before the time is expired for filing exceptions to the bill, the answer may be read on a motion to discharge the writ.

Thorne v. Halsey, 7 Johns. Ch. R. 189.

Art. 15. Con. § 1 *con.* In this case in equity the court referred an issue to a jury. In many cases issues are so referred; but it is a general rule in equity not to direct an issue, unless there be reasonable doubt as to the fact, and when it depends on evidence, the effect of which can be better ascertained by a jury. 2 Jacob & W. 463–503, Short *v.* Lee, especially pages 499–503.

Edwards v. Massey, 1 Hawks, 359. § 13. The affidavit on which an order of *sequestration* is awarded, must state *positively* the existence of the facts on which the application is grounded, or if only matter of belief the grounds of that belief.

Art. 16. Con. § 12. Where a bill is brought to carry a former decree into effect, the deft. in his answer may avail himself of any fraud in obtaining it which would have availed him in defeat-

ing the original bill: 2. If a bill impeach a decree for fraud in the manner of obtaining it, a general denial of fraud is not a sufficient answer. The deft. must answer the allegation specially, and if he be found guilty of the charge the chancellor ought to place the parties in *statu quo*: 3. Where, on exception taken, an answer has been held insufficient, the court cannot, under any circumstances, compel the deft. to answer *instanter*, but must in all cases, allow a reasonable time.

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Carneal v. Wilson, 3 Litt. 87–91.

The testimony of one witness, not aided by corroborating circumstances, cannot avail against answer in chancery. By the Kentucky statute of 1809–10, the deft. may so form or alter his answer as to make it answer the purpose of a cross bill as in the English practice. When so, the plt. in the original bill, by discontinuing his suit, does not put the deft. out of court, but he may have a decree on his answer so substituted.

Sullivan v. Bates, 1 Litt. 42. 2 Litt. 57.

§ 5. To bind the deft. by a *decree*, there must be service of process, actual or constructive, or an appearance. Moore v. Ferron, 3 Marsh. 43, 564.

Art. 17. *Con.*

§ 6. Where the record shows an application has been made in legal time to have a *decree* against absent defts. set aside, and does not show that it has been disposed of by the inferior court, the court of appeals will consider it as still pending there, and no writ of error lies.

Larier v. Larier, 2 Litt. 258.

§ 7. A court of chancery cannot materially amend or alter a *decree* at a subsequent term. A plt. cannot prove a *decree* against one of several defts., unless the defts. are before the court; but one deft., who has answered, may have a trial as to himself before the other defts. are in court, and the decree must be a dismissal *nisi*.

2 Marsh. 10.

Chiles v. Allan, 2 Marsh. 350.

§ 8. If the main object of a suit in chancery is to obtain a division of lands, a decree is proper directing costs to be paid equally by plt. and defts. Costs generally, in equity, to be decreed or not, are within the sound discretion of the chancellor.

1 Litt. 82. Coleman v. Moore, 3 Litt. 357.

§ 7 *Assistance, writ of.* This in ordinary cases is the first and only process for giving possession of land adjudicated in chancery. The complainant had purchased mortgaged premises, under the master's sale, and the deft., on demand, refused to give possession; the petitioner prayed for this writ to the sheriff, &c.: issued, commanding him to give possession to the petitioner.

Art. 18. *Con.*

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CHAPTER CCXXVII.

CAPTURES.

8 Wheat. 108–174, The La Nereyda.

§ 4 *con.* The Spanish consul, libellant, against the brig La Nereyda, a public vessel of Spain, stating she had been captured by the privateer Irresistible, John O'Daniel, master, in violation of the laws of the United States, claimed for one Francesche as a vessel captured under a commission from Artigas, and condemned as prize to the captors in a vice admiralty court, in the island of Margaritta, Venezuela. Held, 1. Whoever claims under such a condemnation must show he is a *bona fide* purchaser, for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors: 2. If one claim under any condemnation as prize, he must produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself. The Irresistible was built, owned, armed, and equipped in Baltimore, got a commission, sailed on a cruise, and captured the Nereyda at sea, in March, 1818. The Nereyda came from Margaritta to Baltimore, Henry Childs, master, he and Daniels, both citizens of that place. No libel was produced, though ordered. The court thought there was no real sale to Francesche, but that the Nereyda remained with the captors. Order to be restored to the Spanish consul, with costs of suit, on three grounds: no such sale: no libel produced: the Irresistible armed, &c. in Baltimore.

10 Wheat. 306–311.

§ 11 *con. Capture made without commission vests in the government.* Appeal from the district court of Louisiana in the case of the Dos Hermanos. Held, seizures made, *jure belli*, by noncommissioned captors, are made for the government, and no title of prize can be derived but from the prize acts: 2. They can only proceed in the prize court for salvage, the amount of which is discretionary, in which the appellate court will not interfere, but in a clear case of mistake: 3. An appeal under the judiciary act of 1789, ch. 20, s. 22, and of 1803, ch. 93, prayed for and allowed within five years, is valid, though the security was not given until after the lapse of five years. The prize acts respect only *commissioned* armed vessels.

1 Mason, 24, The George.

§ 37 *con.* Captors are liable for ordinary negligence. May capture for probable cause; and though there be not *prima facie* evidence to condemn, enough that circumstances warrant a reasonable suspicion of illegal conduct; but the protection thus afforded the captors may be forfeited by subsequent misconduct or negligence.

Where a capture is legal the subsequent bringing into port is also legal, and no cause of damages. 3 Mason, 116. Vol. VII. Ch. 227.

§ 72 *con.* Appeal from the circuit court of Virginia. Libel filed by the Spanish consul in April, 1817, against eighty-nine bales of cochineal, &c. alleged to be piratically taken on the high seas by citizens of La Plata, &c., &c. Held, 1. The commission of a public ship of a foreign nation, signed by the proper authority, is conclusive evidence of her national character: 2. During the civil war between Spain and her colonies, and before we acknowledged their independence, they were viewed by us as sovereign states, and entitled as far as concerned us to the sovereign rights of war in regard to Spain: 3. The exemption of public foreign ships, coming into our waters, under an express or implied license from the local jurisdiction, does not extend to their prize ships, or goods captured in violation of our neutrality: 4. To send armed vessels or munitions of war from a neutral country to a belligerent port for sale as articles of commerce, is unlawful only as it subjects the property to confiscation on capture by the other belligerent: 5. No neutral state is bound to prohibit the exportation of contraband articles, and the United States have not prohibited it: 6. An augmentation of force, or illegal outfits, does not affect any capture made after the original cruise is terminated, for which such augmentation of force, or illegal outfits, were made: 7. But as to captures made during the same cruise, they are infected with the character of tort, and the original owner is entitled to restitution when the property is brought into our jurisdiction. This doctrine extends to captures as well by public as to private armed ships. 7 Wheat. 282-355, The Santissima Trinidad.

8. The enlistment of men being proved (as at Baltimore,) it is incumbent on the claimants to prove they could be *lawfully* enlisted. Here 'claimants' meant captors.

9. The sixth article of the Spanish treaty of 1795 only provides for the restitution of Spanish ships captured *within our jurisdiction*. The fourteenth article respects only *privateers*.

10. In the case of a capture made *within a neutral territorial jurisdiction*, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only on the claim of the *neutral* sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purpose of *prize*.

11. By the seizure and possession of the property (in question,) under the process of the district court, the captor's possession was devested, and the property placed completely in the custody of our law. A condemnation *after* this at

Buenos Ayres is no bar to the present proceedings. The property was restored to the original Spanish owner.

Held, the court will restore to the former owners property captured in violation of the neutrality of the United States, where it is claimed by the *original wrongdoer*, though it may have come back to his possession, after a regular condemnation as prize. The court found 'the captured property in the hands of the offender, and held it to be immaterial through what circuity of changes it has come back to him.'

7 Wheat. 496-519, The Arrogante Barcelones, The Consul General of Spain, claimant. pp. 520-522.

What a capture, and not a seizure in port. See sect. 73, also 15 East, 267; 11 John. 287; 4 Taunt. 387-660.

§ 79 *con.* Under the act of congress of July 6, 1812, held, that living fat oxen, cows, steers, and heifers, are articles of provision, and munitions of war; but driving them on foot is not 'a transportation of them overland, or otherwise, in any waggon, cart, sleigh, boat, or otherwise.'

2 Wheat. 119-122, U. States v. Sheldon.

§ 84 *con.* But such search may be resisted in some cases, as where the neutral master has not been informed of the declaration of war. Phill. on Ins. 226; 5 Rob. 3. So where the searcher abuses his power. Phill. on Ins. 143.

§ 89. *The rights of a letter of marque as to selfdefence.* A vessel armed as such, and so insured, has no right to cruise at large for prizes, but may chase and capture hostile vessels coming in sight in the course of her voyage, without its being a deviation. See ch. 40, a. 12, s. 33, Deviation. 2. It is sufficient the underwriters be informed the vessel is a letter of marque, before they underwrite: 3. Every vessel armed or not, has a right of selfdefence. The master has a broad discretion, and often the best means of selfdefence is in attacking a hostile ship: 4. If a vessel in selfdefence capture a hostile ship, she may take possession and man her, and send her in, if her own crew be not too much weakened thereby.

2 Mason, 230-235, Haven & al. v. Holland.

§ 90. *Neutral rights infringed.* Appeal from the circuit court of Maryland, on a libel filed by the consul general of Portugal, for monies taken out of the Portuguese ship Gran Para. Held, prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States, will be restored, if brought into our ports. Capturing vessel, the Irresistible, was armed and manned in Baltimore, in violation of the laws of the United States. Court cited acts of congress, June, 1794, ch. 296, 1817, ch. 58, April, 1818, ch. 83. Discharging her crew in the river La Plata, and immediately reenlisting them, was an evasion. So Artigas commission.

10 Wheat. 497-501.-7 Wheat. 471.

Wheat. 257-261, Greely and others v. United States.

§ 91. *Case of a prize bond.* Debt on a bond given by Greely and others under the prize act of June 26, 1812, ch.

430, s. 3. with the usual condition. Held, collusive captures and violations of the revenue laws, committed by a private armed vessel, are a breach of the condition of such bond. And if such breach appear upon demurrer, the defts. (obligors) are not entitled to a hearing in equity, under the judiciary act of 1789, ch. 20, s. 26.

Another case of collusion, &c. 8 Wheat. 261–268.

§ 92. *Capture of neutral property by an armed vessel fitted out and manned at Baltimore* is in breach of the neutrality acts of congress. The claim by a *bona fide* purchaser in a foreign port rejected, and restitution decreed to the original Portuguese owners; but he is entitled to be repaid his freight paid on the captured goods.

CHAPTER CCXXVIII.

WRIT OF RIGHT, &c. EXAMINED.

ART. 3. *Con.* 1 Nott & Mc Cord, 296-312

§ 8. A title, under the statute of limitations, in the *third* person, which would bar the plt., if such *third* person were deft., will defeat the plt's. recovery against any other person. When the act has begun to run, no subsequent disability can stop it. And 2 Bay. 76, respects title in a third person.

§ 10 *con.* In Massachusetts, before, or during the trial, if a view by the jury be proper, the court commits the jury to the sheriff, with a proper charge to him and them, and appoints one person for each party to show monuments, boundaries, &c. to the jury, but not to debate before them.

ART. 4. *Con.*

§ 1 *con.* 2 Bay. 135. The writ of right never adopted in South Carolina, nor continual claim for lands; but only ejectment and trespass to recover lands.

7 Wheat. 27-36, Green v. Watkins.

§ 8. *Title or seisin in a third person.* In a writ of right the tenant cannot give in evidence the title of a *third* person, with which he has no privity, unless it be for the purpose of disproving the demandant's *seisin*. Hence, if he prove an actual seisin, by *pedis positio*, the tenant cannot be permitted to prove a superior outstanding title, since it does not disprove the demandant's seisin; but where the demandant relies for proof of seisin solely upon a constructive actual seisin, in virtue of a patent from the State, of vacant lands, the tenant may show the land has been *before* granted by the State, for that divests the title of the State, and disproves the demandant's constructive seisin. The writ of right brings into controversy only the titles of the parties to the suit, and is a comparison of those titles, and either party may therefore prove

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any fact which defeats the title of the other, or shows it never had a legal existence, or has been parted with. Green's patent was dated January 28, 1784, of lands in Kentucky, and the tenants were allowed to show the State gave patents thereof to others in 1782, so that Green never had constructive actual seisin of the lands, the only seisin on which he relied; and the court say, if the demandant once had title, the tenant may prove, 'that he has parted with his whole estate, by a conveyance competent to convey, and actually conveying it.'

Jackson v. Stiles, &c. 5 Cowen, 447, 448.

Ejectment. Motion the landlord be admitted to defend. The plt. may show he had, after the lease, conveyed away all his interest in the premises in question.

2 Pick. 28.

§ 20. Writ of right amended. Demandant declared on his own seisin within forty years, allowed to amend by making it thirty years; also to enter on the record the death of one of the defts.

4 Pick. 244.

§ 21. In a writ of right a plea averring a seisin of land to be in the tenant, for the purpose of enjoying an easement of a right of way, is bad. The effect, if allowed, 'would be to shut out the plt. from the use of the land over which the way runs;' though consistent with the deft's. right of way, the seisin remains in the owner of the land.

Malcolm v. Rogers, 1 Cowen, 1–13.

§ 22. Writ of right in New York. The writ is in the usual form. There is a statute of the State regulating part of the proceedings, and especially the summons to the tenant and the service of it, and the grand cape may issue in certain cases. Decided in this case, 1. Proclamation of summons in a *real* action must be at the church in the town or ward *nearest* the lands demanded, and so returned: 2. If not so returned the *sheriff* may amend: 3. *Personal* service on the tenant renders proclamation unnecessary: 4. The manner of service must be plainly expressed in the return: 5. It is not to be aided by intendment: 6. If the return to a writ of right be defective, an *alias* summons goes, instead of a *grand cape*.

The form of the writ. Of the sheriff's return; the demandant must appear the day of the return. The tenant on the *quarto die post*, (May 8, 1823.) If the demandant be not attending, the tenant may have entered against him a *ne recipiatur*. On the *quarto die post*, the demandant produced his writ and return and moved the tenant be called, and in default of appearing, that a grand cape might issue. Tenant's counsel opposed the motion for a grand cape, and shew the return was defective, and not in conformity to the statute, and the demandant entitled to an *alias* and summons merely. Arguments at considerable length. On English authorities mainly, which the court seemed to think not very applicable.

The court said 'where an omission of duty would be culpable, the officer will in general be presumed to have done his duty; but we think the rule does not extend to this case.' The tenant's counsel opposed the amendment of the return, mainly on *English* authorities, refusing amendments in *real* actions, and especially in a *writ of right*. The return being amended, and the deft. appearing, the demandant produced and filed his count minutely stating the fact of his case, the ancestor's seisin within twentyfive years, his heirs, &c., &c. In principle the count was in common form, except it negatived facts not usually negatived in declarations in real actions, and unnecessarily. Special imparlance to August term. The first day of August term the tenant pleaded in abatement of the count a nonjoinder of certain persons on the part of the demandant. He prayed special imparlance to the next term. This was granted. He varied to the fourteenth day of the August term, and then demurred to the plea. Tenant had leave to imparl to the next term the first day.

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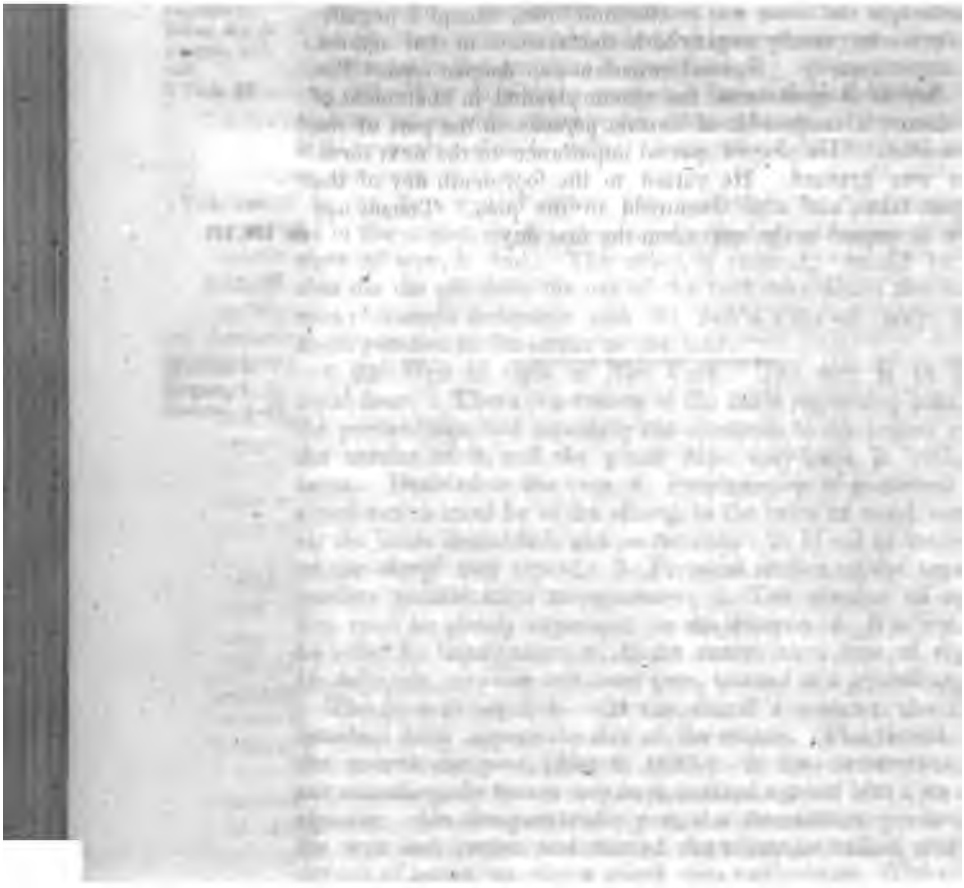
pp. 186, 187.



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Ch. 19, a. 22, s. 6. She retains her bank shares by her husband's consent after his death. Her will giving him her choses in action, by his consent, is void, 6. How she, separated from bed and board, may sue him for alimony.

Ch. 19, a. 22, s. 8. The sole deed of the wife of her land, is void, except her release of dower. Husband and wife join in a covenant, as to her land, he must be sued alone, 8. Must join in a deed of her land, but may use different words, she of conveyance, he of quit-claim, 8. New Hampshire, New York, her deed alone is void, &c., 8. Deed of land to them, both become seised of an entirety, 8. Neither alone can sell, 8. Whole is to the survivor, 8. His possession after her death is at sufferance, and not adverse to her heirs, 8. Where her warranty does not estop her after his death, 8. She cannot contract, 8. If he voluntarily assign her fund in court, yet it survives to her, 16.

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Ch. 20, a. 3, s. 3 con. Only notes payable to *order* or *bearer* for *money*, are negotiable; is not to pay corn, paper money, &c., but is if payable in current bills in the city of New York; note ceases to be negotiable in several cases, as s. 9. Note over due is negotiable, but is subject, &c. as between maker and payee, 9. Once paid is no longer negotiable, 9–22. Nor if not payable in money, 9.

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Ch. 144, a. 12, s. 1. In a suit on a bail bond forfeited, the bail can only plead *comparuit ad diem*. Other points, 1.

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Ch. 221, a. 16, s. 2 con. Error to the supreme court of Vermont on the 25th section of the judiciary act of September 24, 1789, (ch. 20,) how the appellate jurisdiction may be exercised on that section.

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Ch. 105. Covenants that run with the land. Art. 1 con. s. 38, long and special case.

Ch. 106, covenants binding on heirs, executors, administrators, wives, assignees, &c. a. 6 con. s. 14. As to executors of assignees, see ch. 105, a. 4, s. 38.

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Art. 6, s. 6 con. Newly discovered evidence cause of, or not. 28 con. on this ground the party must show three things. Art. 6 con. s. 41. As to any part of the evidence omitted by the judge, the way is to request him to notice it; if he refuse, it is cause of a bill of exceptions, 41. Not a *mandamus*, 41. Six points decided, 41a.

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APPENDIX

(9TH VOLUME)

TO

DANE'S GENERAL ABRIDGMENT

OF

AMERICAN LAW, &c.

PREFACE.

In this Appendix the powers and duties of the General and State Governments in relation to each other, are extensively examined. This examination is principally, occasioned by important measures proposed, and by speeches and writings, of high order, published since the 9th and last Volume was printed.

These powers and duties have been, briefly, noticed, in several parts of this Abridgment; especially, in Chapters 143 and 187—and in its Sections 13—22, in Art. 20, Chap. 187, Vol. 9th, are largely extended, in order to bring, into view, many facts and records, for consideration; lately made very important, by attempts to make, even a State Legislature Supreme Judge and nullifier of acts of Congress.

The Table of Contents, and a copious Index, disclose at once, the broad grounds, in part now here taken. It is believed, that on thorough examination, it will be found that scarcely any important part of our complex system is more imperfectly understood than the origin and extent of the powers and duties in question. That the general government was *first* instituted by the people, in their original sovereign capacity, on *revolutianary* principles. That this government, being in full operation, on those principles, did July 4, 1776, lay the first foundation of *State rights*, by the Declaration of Independence, and that, *afterwards*, the State governments (except one) came into existence in the *acknowledged subordination* to this General Government.

It is a settled principle, when a people remain the *same*, as did our American people, on and after July 4, 1776, changes in their *forms* of government, may be made, and not affect the source of their national power, sovereignty, rights, duties or allegiance. In this Appendix many records and authorities are cited, which support these positions, and prove this National priority and constitutional superiority. Records and authorities, which, it is believed, have never been properly examined in any work.

Hitherto, for forty years, the General Government has levied impost duties and other taxes, evidently for two purposes—one to raise the necessary revenue, the other so to raise it, as to encourage various branches of domes-

tic industry. To this day the two objects exist. As yet no more revenue is raised than is wanted—there may well be much discretion in Congress, in regard to *both* purposes, ends or objects combined, which may not exist, when the fair demand of high duties, and taxes *as revenue*, shall, in a good measure, cease. It is a new point, that need not now be considered—How far high duties can be imposed, merely to encourage such branches of industry, and when they shall not be required *as revenue*, is a great question which never till then can be fairly considered. As to roads and canals, I here, merely, observe, they are in a way not long to be a subject of much controversy—so many states, and several great ones, are so fast and extensively taking them into their own hands, and each making its internal improvements, at its own expense, that soon a majority of the states must naturally, be opposed to expending federal money to support them except where, *clearly and purely* national; much demanded and deemed to be worth the expense.

It is the *State nullifying* doctrine, and *State separation*, which at present, almost exclusively, demand the serious attention of every friend of the union and of this nation. Not that these are grounds of much fear in themselves—but the danger to be feared is in our violent parties; and, especially, when the deep *sectional* interests of the East, of the South, or of the West, are, in heat, and passion, made to operate on high party principles. It seems, generally, to be admitted, Congress has some power to aid some such branches and improvements; but *how much* power is a question too great and difficult for me to enter upon. Perhaps never to be discussed, to advantatge, but when an act of Congress proposed, shall make discussion proper in the case in hand. Many questions, great and difficult, grow out of our system, wisely uniting law and civil liberty—and we must resign it, or meet them with labour, candour and patience.

I merely mention another subject of the highst importance, not to discuss it, but for abler men to examine and look to consequesces. But yesterday I saw it publicly proposed, in South Carolina, to separate from the union—make Charleston a free port, or lay impost duties five or ten per cent only; as measures promising fair to double her population and wealth in ten years. As if the other states, will quietly permit a small state to usurp *Judical* power, to decide acts of Congress are unconstitutional, to declare them void and to separate, and so to regulate her impost duties as to destroy the *only* revenue system of the other states, Their people readily acquiesce *in all* this to gratify men, intending to double their population and wealth in ten years, to the ruin of other states—If South Carolina can do so, any other state can do so. I should not mention a case so pernicious and unlikely to be suffered did not two principles avowed even by the more moderate Col. Drayton lead to it--I mean the right to separate and holding the government by majorities a more truism.

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RECENTLY the Debates on Foot's resolution in the Federal Senate, and Jefferson's Writings have appeared, embracing the novel and important doctrine, which teaches, that a state legislature, or a state convention, can finally decide on, and nullify, acts of Congress; and that state sovereignty is not subject to judicial cognizance—a doctrine yet but imperfectly understood, and interesting to all. Therefore, we see, in these Debates and Writings, many different opinions, which require close examination. Now is a fit period to fix the *common arbiter; the judicial tribunal of the nation*. Evidently, much the largest number agree it is the Judiciary—of this no better proof can be expected, than is seen in these Debates and Writings. In the East, the Judiciary, State and Federal, is, invariably, considered the proper tribunal, finally, to interpret the constitutions and laws, with a few exceptions, made in the constitutions. If in the Federal Constitution there is yet too much room for wide construction, and for bare majorities to oppress minorities, in some few special cases, the fault is in the Constitution, not in the Judiciary, which fairly construes it *as it is*. Prior to the year 1794, a number of men, in the different states, including the author, wrote largely in favor of the amendments adopted (foreseeing they must be subsequent) and of others against constructive power, such as oppressive laws, and state *suability;* of course, their main object was, to shew what the Constitution *ought to be*. Since, most of their amendments have been made; also, several of them have often been in a situation to *construe* the Constitution, of course to show *what it is*. Though their arguments and opinions in the two cases, may appear different, their course may be perfectly consistent. Some may think otherwise, who do not properly notice this distinction. Some seem often to contemplate only what they think a law or constitution *ought to be*, and so do not inquire *what it is;* of course, they differ from those who only inquire *what its meaning is*. This difference often exists between the judge and the legislator—one, almost intuitively, inquires what the law is, the other what it ought to be; hence their course of thinking is very different.

SECT. 1.

General View.

Arbiter. Common.

Amendments.

Many of the loose constructions of the constitution, may be traced to Jefferson's writings, since the year 1775. Though eminent in many things, he never was an accurate, experienced lawyer; he practised, and read law too little to be one; yet, in the recent debates, even able democratic senators made him their *Plato*, avowedly; as many, even of high order, do. Hence, the propriety and necessity of examining his plans and writings, largely and carefully. His draft of the Declaration of Independence was little more than putting the ideas of others into an elegant form. In revising the laws of Virginia, he was only one of a Committee, hence, what part was his, we do not know. In

Jefferson.

Plato.

Sect. 1. April, 1784, he reported in Congress a plan of Government for the North-western Territory, so very imperfect, that it could not
Ordinance. be mended to answer any purpose, nor could materials in it be found to form a thirteenth part of the ordinance of July 13, 1787; (Note A.) as may be seen in the Journals, on a strict comparison of the two. He often mentions the Territory, but never the Government of it; his friends will account for this.

He, unnaturally, changed his political notions, and grew more democratic as he increased in years. When forty years old he was quite aristocratic; one proof of which, is, his Senate founded on *wealth*, next on virtue and talent. He then could not think, as he did, late in life that 13 parts in 14 of the higher orders in society are rogues; first stealing from the people their confidence, then their rights. See his Letters, which also show most of his correspondents were of these orders, many of whom he placed high in office, civil and military, as the public records prove. Could they all be of the fourteenth honest part? and make his supporters the great majority of the Nation he boasts of! Platonism, perhaps, can explain all this. When about 50 years old, he claimed for the Judiciary too much power; as a part also in legislation, as is the case in New York; then, too, he was generally correct in his politics. One proof of this, is, that he, after oscillating, decidedly approved, and preferred, the Massachusetts' course in adopting the Constitution, and recommending certain subsequent amendments; the true course of the middle party, which the writers above alluded to, adopted. So his thinking with La Fayette and the soundest statesmen, in France, proved him so far correct.

Judge Roane. After he returned from France, his notions became very democratic, going, as to state rights, far beyond Judge Roane, the great Virginia advocate of these rights; as one proof, see his letter to the Judge, dated Sept. 6, 1819. Jefferson *is the* only man found, proposing to have the Federal Judges appointed only for 4 or 6 years, by the President and Senate;
Barry. (see his letter to Barry, July 2d, 1822;) thus making them so often entirely dependent on him and Congress. But, Oct. 1st, 1792, Vol. 4th. p. 471, he thought the executive, (Washington, President,) had swallowed up the legislative branch. At another time, 1822, (Monroe, President,) Mr Jefferson proposed, that the *executive* should have added to its all swallowing power, the Judges, at his control every 4 or 5 years, with the Senate's consent.

Generally whoever will carefully read all Jefferson's writings, published since 1774, will see the causes, which carried him to this extreme, late in life, and such a reader will come to these conclusions—

1st. That Mr Jefferson was a general reader and an elegant writer, eminent in his knowledge of mankind, and skilful in managing them to his purpose;—touching on many arts and sciences; eminent in some, not requiring depth of thought.

2d. That he was correct in his morals, an avowed materialist, and singular in his religion—naturally benevolent and a friend to peace.

3d. When nearly 60 years old, several causes produced his hostility to the Federal Judiciary; as, 1st. The manner in which the Federal majority in Congress, in Feb. 1801, established the Circuit Courts. 2d. The opinions of Chief Justice Marshall, in the case of Marbury and Madison, and Burr's trial. 3d. His fixed aversion to him. 4th. Mr. Jefferson's suffering himself to be too much under the influence of the jealous, busy, credulous, tale bearing part of the Democrats—himself, too, credulous, by listening to their loose and often erroneous information, and party reports, of what conspicuous federalists, male and female, said at dinners, and at other accidental, or social meetings, of two or more, and often when in a passion. See his minutes, signed by him in the 4th vol. pp. 444—520. In these, and other ways, by his own credulity and party jealousy, and feelings, he was often misled—therefore he believed the monarchists, in the United States, were numerous, when Washington did not believe there were ten worth attention. 4th vol. p. 470. In his said minutes, &c. he named as monarchists, Hamilton, Knox, Steuben, Cabot, and 7 or 8 others, not more.

Monarchists.

Hamilton, &c.

It appears in those minutes, that he was in the practice of noting at the time, what was said, by the President and heads of departments, at their official meetings, often in warm party debate—what was said, mainly, by a few, and those deemed high federalists, to whom only at times, he ascribes monarchy, toryism, British leanings, and corrupt treasury influence, hostility to France and republicanism. Had he not, formally, signed his minutes, in each case, "Th. Jefferson," one would certainly infer, he never meant them for the public. He, scores of times, for his party purposes, minuted the words of federalists that came to him, through two, three, or more different persons; as for instance, A, a federalist, said to B. a democrat, the Constitution will not last ten years. B told this to C, and C told it to Mr. Jefferson. Often, neither the connexion in which, nor the occasion on which, A spoke the words, appears—yet they were enough to prove him a monarchist in Mr Jefferson's view; in whose opinion, Hamilton was the monarchical tory, English and corrupt treasury leader. Yet, even against him, Mr. Jefferson's evidence amounts only to this; that Hamilton believed in the necessity of treasury influence; that he believed it best to try the Constitution, which he said did better than he expected; but, in time, monarchy must come. Vol. 4th. pp. 453, 454.

His Minutes.

Monarchists.

This kind of talk, heard by Mr Jefferson, himself, or indirectly conveyed to him, appears to have made him believe that a numerous sect was plotting and fast driving the Government into consolidation and corrupt monarchy; and that, when the federalists became the minority in the legislative and executive branches, their object was to secure their power in the *Judiciary in concert with the Judges*. His fears spread among the people, many of them took the alarm, and this alarm has ever been kept up, even since a majority of the Judges have been appointed by democratic Presidents.

SECT. 1.

3d. His few years' practice and inconsiderable law reading, and his Platonic mind, made him a loose interpreter of the Constitution and laws. He was so opposed to the decisions of the Supreme Court, that he called them "usurpations," and "the sappings and minings of the Constitution;" and seems to have found but one to exceed him, whom he called "the hot-headed Georgian." Vol. 4th, p. 421.

4th. He, in his jealousy, evidently, thought that all the clergy and federalists, most of the Judges and monied men, were his enemies, and that the more moderate republicans were too cool; so, clearly, the more violent, jealous, tale-bearing democrats, watching his jealousies and prejudices, most influenced him.

Mr. Jefferson often boasts of a great revolution in principle, produced by him and his friends in 1798—1800, &c. that is, in taking the government from the "corrupt mercenary" hands of federalists, and placing it in Jefferson, and democratic hands; and, in them, preserving it. He, who carefully reads Jefferson's writings, will observe his principal charge against them is, their multiplying dependents on the federal treasury, and of course, taxes. This he ever called corruption; and no doubt it is the main source of corruption in every nation; and of oppressive taxation. This brings us to the fair inquiry, which great party most multiplied such dependents? If office, job, and pension seeking and granting, proves treasury influence, so corruption, where is Jefferson's boasted purity? One must be blind indeed, not to see that this sort of corruption is now tenfold greater than it was March 4th, 1801, when he and his party got the Government into their hands; and soon after, as will be shewn, attacked the Judiciary, and have continued their attacks on it to this time. As to treasury dependents, so corrupting, since March 4th, 1801, some thousands of job and office seekers, have been added, who disgrace the country by their struggles to remove from office, and get in place after such removals; and contests have, mainly, appeared since March 4th, 1801—as even States have been encouraged to hang on the treasury of the nation—a wise way indeed to support State rights and sovereignty on pure principles.

Treasury dependents and corruption.

Office seeking.

Pensions.

Since March 4th, 1801, about 20,000 military pensioners have been made, solely on the ground of *charity;* for, if on the ground of *service*, the public records shew that thousands of them, by enormous bounties, and otherwise, were extravagantly paid when they served; that other thousands of them were scarcely paid any thing. Their pensions, probably, will, in time, amount to 25 millions of dollars. Clearly, if services were intended, the proper distinctions would have been made, as they might have been, by turning to those records; and thousands of three years' soldiers, each of whom extorted a bounty of more than four hundred and twenty silver dollars, never would have been put upon a footing with thousands who served as long, almost without pay or bounties. Where, too, was the justice in commencing such *unexpected charities*, 35 years after the war ended, when many of the aged and infirm had died in poverty, unpaid and unpitied? I do know that the military services in

the *aggregate* were paid nearly as promised, but in ways so very unequal as should have been corrected, in a manner Congress had power to do, and those so extravagantly paid should have been left to the care of the respective States, to whose care alone our system leaves all who need public support. The Sates best know how to afford it with economy, and in a manner least to hurt honorable feelings. These things are now mentioned also for a special reason; those who read American histories and speeches may well think the American people in the Revolution, in the most niggardly manner, nearly starved those who served in the armies. This was not the case, the people at home did their duty amply, the wrong was not theirs, but in those monstrous inequalities. SECT. 1.

It is now time that the truth should be better known, and the people no longer suffer unremitted reproach. The soldiers' loss on their paper promises, which were sold for mere nothing (very largely, however to military men,) was not the people's fault, but owing to the two grand defects in the confederation;—1st. Its operating on *States*, not on *individuals*;—2d. Its requiring a unanimous concurrence of all the States to grant impost duties; for almost all the States seasonably granted those duties. Therefore, the federalists, who commenced their efforts early in 1781, in building up the Union on pure federal and republican principles, as will be explained, engaged in the best cause, in which men ever engaged; and, if a very few of them had tory notions, (as no doubt some few had,) it is certain, that nearly all who remained whigs in the war, do remain pure, republican federalists, in the true sense that formed, adopted, and amended the Constitution. People defended. Federal cause.

God grant, that compensation to soldiers, so extremely unequal, and a precedent so dangerous, in a republic may never be repealed, but be it honestly fulfilled now it is adopted.

This pension plan gives each one of thousands of common soldiers, the value of 500 specie dollars, at least, for each years' service whilst the industrious, prudent soldier supports himself, and often also pays pension taxes. Boasts of purity, economy, and no treasury influence, further call for notice of these things. In fact, before March 4, 1801, there was little said or thought about State rights, judicial usurpation, roads and canals, high tariffs, long embargoes, &c., which since have so disturbed the nation, and threatened the Union. Again, has our Judiciary, State or federal, ever multiplied treasury, or any dependents? Is it not perfectly clear that in the Roman, and in every other Government, corrupted, the Judiciary has been the very last corrupted or corrupting? Then, are not the supporters of the Judiciary the purest republicans?

Indeed, how can Judges, State or federal, act corruptly or usurp power—their proceedings are all public, Juries, in general, participating in them, are under the eye of opposing counsel, and in cases of State rights, usually, counsel opposed in politics—not only their decisions, but their proceedings at large, are soon reported and published, by public reporters—Very different is the law of the executive—all examinations and divisions are in private, by the President, and by advisers existing at his will. No Judiciary now public, Executive not.

SECT. 2. Juries interposing, appointed and introduced by state laws—no opposing counsel to watch and to except to evidence which is soon to be made public—no reporter to attend and in 6 months or sooner to publish all—Judicial proceedings watched and published, may often disclose motives, or errors, if any exist, that may furnish grounds of impeachment of rulings, of legislative interference, or of amendments, not of the executive as its motives and errors are not so disclosed for improper ones exist.

Terms Sovereign popular not constitutional.

The terms, sovereign states, and state rights, considered, are shown to be popular, not constitutional terms;—state power be limited.

As very often, since the Old Confederation was formed, the word sovereignty, in some shape, has been applied to individual states, in speaking and writing, one would naturally expect to find it in the Declaration of Independence, and in every constitution since formed, in Federal America. How surprised must he be, on examination, to find it is not in the Declaration; nor in the Constitution of the United States; nor in 22 of the state constitutions, now existing—that this word, *sovereignty*, as so applied, was in a subordinate sense, first used in the articles of confederation, entered on the Journals of Congress, Nov. 15th 1777; so, then first made public; that from these articles it was in the year 1780, adopted, in a *subordinate* sense, into the Constitution of Massachusetts—and from that, in 1792, was copied into the Constitution of New Hampshire. This is the last time we find it *constitutionally* used. This term, naturally found its way into those articles, and as naturally ceased and passed away with them, to all *constitutional* purposes; though its popular use has been ever increasing to this day. These matters will be further considered in the subsequent pages; in which it will be an object, to show, that the terms, *sovereign states*, *state sovereignties*, state rights, *rights of states*, &c. were only *popular*, not *constitutional* expressions: grown into very popular use in party times; especially, in the contests between the more zealous supporters of the General Government, and the more zealous supporters of the State Governments. I shall also show, that, to support the true balance and *equilibrium* between them, we must be governed by our true principles and *constitutional* instruments, and not by the popular language of parties, and the loose notions of superficial thinkers.

Equilibrium.

It will be seen in the following pages, that we all too often use the word federal, and other convenient words, in a popular, inaccurate sense, a sense not authorized by the constitutions and laws. The main object is, to ascertain the true constitutional rank of our individual States in our political system—how far they are bound together under one head, the General Government, and how far they are subordinate to that Government, and each controllable by the other.

SECT. 2. The origin of the Union.

In order, correctly, to ascertain this rank, this linking together, and this subordination, we must go back as far as January, 1774, when the Thirteen States existed *constitutionally*, in the condi-

tion of 13 *British Colonies*, yet *de facto*, *the people* of them exercised original, sovereign power in their institutions in 1774, of the Continental Congress; and, especially, in June, 1775, then vesting, in it, the great national powers that will be described; scarcely any of which were resumed. The result will show, that, on *revolutionary* principles, the General Government was, by the *sovereign acts* of *this people*, first created *de novo*, and *de facto* instituted, and, by the same acts, the people vested in it very extensive powers, which have ever remained in it, modified and defined by the articles of confederation, and enlarged and arranged anew by the Constitution of the United States—2d. that the State Governments, and States, as *free and independent States*, were, July 4th, 1776, created by the General Government, empowered to do it by the people, acting on revolutionary principles, and in their *original*, *sovereign capacity*; and that all the State Governments, *as such*, have been instituted during the existence of the General Government, and in subordination to it, and two thirds of them since the Constitution of the United States was *ordained and established* by all the people thereof, in that sovereign capacity. These *State* Governments have been, by the people of each State, instituted under, and expressly, or impliedly, in subordination to the General Government, which is expressly recognised by all, to be supreme law: and as the power of the whole, is, in the nature of things, superior to the power of a part, other things being equal, the power of a State, a part, is inferior to the power of all the States. Assertions that each of the 24 States is completely *sovereign* that is, as *sovereign* as Russia or France, of course as sovereign as all the States, and that this sovereignty is above judicial cognizance, merit special attention.

SECT. 3.

Though the words, *sovereign* and *sovereignty*, are certainly too convenient, in speaking and writing, to be disused; yet it is clear, that, in the strict and accurate use of words, they cannot be properly used, as a part of our *constitutional* language, in a constitutional sense; and this distinction is generally to be regarded.

As the words, *compact*, *federative compact*, and *consolidation*, have long and often been applied, by all parties, to the constitution of the United States, and, for forty years, one great party has viewed it as a *federative compact* among the States, and the other great party not as such a compact, but, in the main, national and popular, it may be well, in the outset, to state what is meant by these terms. A *consolidated* government has been, and may be defined, to be, one "founded on the consent, expressed or implied, of the people of the *whole nation*, and which operates, in all its departments, directly upon the people," *as individuals*, and not in their *political* state capacity. Different is "the consolidation of the Union," mentioned by the Convention, in its circular address. This only meant to strengthen the Union. A *federative* government has been, and may be described to be one, which "is composed of several independent states, bound together for specific national purposes, and relying, for the support

SECT. 3. Our system is a mixed one, and *sui generis*.

SECT. 4. and efficiency of its operations, on its action on such states, in their *political* capacity, and not upon their citizens *individually*"—that is, a government *completely federal* and *federative*, founded wholly on a federative compact, acts and operates, entirely through the *medium* of the authorities of such states, and one *completely* consolidated never so acts and operates, but entirely on the citizens or subjects, *individually* and *directly*. Probably, therefore, no federal republic ever existed completely federative, or completely *consolidated*. If the Constitution of the United States was not created by compact, then it was ordained and established, as a statute or ordinance is, by the American people, "as one people or nation," and may well be called a popular *government;* because, wholly created by an act of the people in their original sovereign capacity. Though the General Government be so ordained, *by one people*, still in one sense it may be *federal*, as it may act through States, and on States, partially sovereign, and not on *individuals*, directly, in cases more or less numerous, as the people may have placed more or less power in their General Government, and to operate more or less directly upon individual persons. Hence, it is obvious, in our system, those words, compact, confederacy, confederation, federative compact, consolidation, popular, national, state rights, state sovereignty, federal sovereignty, &c. must be used with some limitations, expressed or understood. We find that Congress, as early as Sept. 19th and 27th, 1774, acted directly on *individuals*, in several cases, so on the principles of consolidation; as, in advising the merchants of all the *United Colonies*, not to import British Goods; also, in *resolving* that no goods should be imported, (by individuals) after a time named, and that those imported should not be used or sold. Soon after, Congress resolves so operated on *individuals* in other cases. It is material to bear in mind that extensive powers were exercised by Congress, on *popular* principles, before state powers, in fact, existed. We find no *state* power, in fact, nor any evidence of a federative compact, among the Colonies, even by Congress, using its authority as a medium of action until May, 1775. Until April, 1775, most of the Colony legislatures continued and acted under the colony charters. Before July 4th, 1776, Congress levied land forces, commenced a navy, and conducted all the operations of the war—erected a post-office department—emitted bills of credit, asserted the rights of the people, *as one people*, to take their *station as one nation*, not *stations* as *several Nations*, to which they were entitled. After Congress met in May, 1775, it exercised mixed powers, a small part on *Colonies*, and then on *States*, and nearly the whole on *individuals*, as their Journals will show.

Individuals acted on in '74.

Power first in Congress.

SECT. 4. One object in this inquiry is, to examine some extraordinary opinions expressed in the Senate of the United States in January, February, and March, 1830, and in Jefferson's Writings.

Mr. Jefferson, in his letter to Edmund Randolph, dated August 18th, 1799, charged the Judiciary with audacious, barefaced assumption, in holding that the common law is "in force, and cognizable as an existing law," in the federal courts, without the

Colony called a nation, improperly.

adoption of Congress, and so infinitely beyond their power to, adopt," the extent of which assumption he totally misunderstood as he does the principles on which those Courts use the common law. He says, "before the Revolution, the *Nation* of Virginia had, by the organs they then thought proper to constitute, established a system of laws"—of common law and chancery. "When, by the Declaration of Independence, they chose to abolish their former organs of declaring their will, the acts of will already formally and constitutionally declared, remained untouched. For the Nation was not dissolved, was not annihilated; its will, therefore, remained in full vigor; and on the establishing the new organs, first, of a Convention, and afterwards a more complicated legislature, the old acts of national will continued in force, until the Nation should, by its new organs, declare its will changed. The common law, therefore, which was not in force when we landed here, nor till we had formed ourselves into a Nation, and had manifested by the organ we constituted, that the common law was to be our law, continued to be our law, because the Nation continued in being, and because, though it changed the organs for future declarations of its will, yet it did not change its former declarations, that the common law was its law. Apply these principles to the present case. Before the Revolution there existed no such Nation as the United States; they then first associated as a Nation, but for special purposes only. They had all their laws to make as Virginia had on her first settlement as a Nation; but they did not, proceed as Virginia had done, to adopt a whole system of laws ready made to their hand. As their association as a nation was only for special purposes, to wit, for the management of their concerns with one another, and with foreign nations, and the States composing the association chose to give it power for those purposes, and no other, they could not adopt any general system, because it would have embraced objects on which this association had no right to form, or declare its will. It was not the organ for declaring the national will in these cases. In the cases confided to them, they were free to declare the will of the nation, to be the law, but till it was declared, there could be no law; so that the common law did not become *ipso facto* law on the new association. It could only become so, by positive adoption, and so far as they were authorised to adopt."

Sect. 4.

On this long and obscure clause, the following remarks (among others) may be made.

1st. Mr. Jefferson is correct in holding, that a people may change their form of government, yet retain their laws and their delegated power, legislative, executive, or judicial, undiminished; but, by express words in the new form they may increase or diminish it. This principle I shall apply to the General Government, in the three forms in which it has existed.—1st. The *Revolutionary*, commencing in 1774, and ending March 1st, 1781, when the Articles of Confederation were finally ratified. 2d. Under these articles of Confederation. 3d. Under the Constitution. But to change the form, and retain their laws and power delegated, there

Sect. 4. must be no change of the source of that power, and not a total change of allegiance, as there was in our Revolution, from the King of Great Britain to the government in America.

2d. He, evidently, is in an error, in considering, as he does, *Virginia a complete nation*, in her colonial condition; *her own sole law maker*; for he does not notice, in any manner, her dependence on, or connexion with, the British Government. Whereas she was so dependent and connected, that her citizens owed allegiance to the king, and had but one of three branches of legislation, and that one was in their representatives; so that they alone could not enact any law, and they had no executive or judicial power independent of her British condition and connexion. I shall pursue the subject of colonial limitations farther, when I shall come to the consideration of Senator Rowan's opinion, that Delaware is as sovereign as Russia. I will here only add, that Jefferson's exalted idea of colonial and state sovereignty or power led him, in drafting the Declaration of Independence, often to use the word *States* so improperly, that Congress struck it out in each case, and declared these *United Colonies* are, and of right, ought to be, free and independent States. Further, if the Colony of Virginia was a *nation*, the thirteen colonies were *thirteen nations*, and now according to this doctrine we have twenty four nations, and the Union as the twenty fifth.

Common Law and equity. See 7 Cranch 32, 33. 3 Wheaton 221, &c.

3d. As to the common law, he clearly thinks the federal courts assumed it at large. The case however is not so. They practised on the principles of the common law, on two grounds, in a limited manner; first, on the 34th section of the judiciary act of Sept. 24th, 1789, which provides—"that the laws of the several states," except, &c. "shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." These state laws include the common law, as it exists in each state. The federal courts can use it as far as it applies to federal cases under this section. Second. When this common law so applies, the federal courts can use it, in some few federal cases of necessity, on the same principles those courts adopt the whole system of equity from scores of English and American reports, not acts of Congress; for *there* are none on the subject. If he had been a better lawyer he would not have charged the courts with audacious, barefaced assumptions. We observe another error, Virginia made no Declaration of Independence, so did not, *thereby*, abolish former organs. Congress declared, and made the 13 Colonies, free and independent States, including Virginia; and absolved her from her allegiance to the British crown. There was no act in Virginia to dissolve this allegiance; but Congress dissolved it.

Independent States made by Congress.

Common Law.

It is understood that neither Congress nor the Federal Judiciary ever thought of adopting the common law generally, but only as applicable to federal cases, of necessity and usefulness, and mostly on the above section, on the very principles upon which the state courts adopt the common law, without statute enactments, as necessary and proper in cases within their jurisdiction. Next, American statutes, state and federal, are enacted,

and our constitutions are ordained, with reference more or less to the common law; for instance, the jury trial, without such reference, would have no meaning in our statutes, or Constitution. Our Bills of rights are but an epitome of parts of the common law, of little value, if we refer not at all to the parts of the common law, of which all these bills are an epitome. SECT. 4.

Mr. Jefferson omits that important feature in the Constitution, whereby the laws and treaties made under it, operate on *individuals*, not through the medium of *state governments*, which make it so far not *compact*, but one *entire government*, ordained by the whole American people, *as one people*, *popular* and *consolidated*, though in other respects it may be *compact* in a small degree. Individuals acted on.

I have said above, that a people may change their form of government, and retain their laws, &c. but, to do this, there must be no change of the *source of power*, and not a total change of allegiance. For instance, when the people of Pennsylvania changed their form of government, in 1790, each form, the old which was abolished, and the new which was adopted, was from the same *source of power*; that is, *the same people*, or in Jefferson's language, the *same nation*. He gives us, in his usual loose way, no facts on which he rests a position. To form a correct opinion in our *revolutionary* case, we must precisely ascertain and state many facts, to find the effects of the changes in our Colonies and States; as for instance, Virginia, from the year 1773 to 1790. This I shall endeavour to do, in these pages. It is enough to say, at present, we can find an important chasm, which he never notices; that the power to make laws, and change the forms of government, or, in his style, "the organs of declaring their will," (the people's will,) did not continue in the same source in Virginia, &c. In 1773, on scrutiny, we shall find this power, and its source, partly in the people of Virginia; partly in the king and parliament. In these different sources alone, actually, was constituted the *colony* of Virginia, together with allegiance due to the king. Hence it was, that Congress, as late as July 4th, 1776 thought best to retain the word and description "*Colonies*." By referring to our records, by which posterity will be governed, it will be found that the *thirteen* were *colonies* to July 4th, 1776; then, in a moment, by a vote in Congress, made *Thirteen States*—So was Virginia made a state, free and independent, not by any sole act of her own. Before this she was not a *State*. Mr. Jefferson's thinking her a *State* before July 4th, 1776, proved his inaccuracy, which, Congress corrected. July 4th, '76, the people of New Jersey made, and constituted themselves, a new organized *colony*, solely, on *American* principles, and a source of power, exclusively, *American*. Sept. 20th, '77, the legislature substituted the word *state* for the word *colony*; and July 4th, '76, there was no other colony so organized; therefore, when Congress, at that date, named *colonies*, the real British colonies were intended. Organized as long as they had been, some, as for instance Connecticut and Rhode Island, had no more *internal* power to make laws than Virginia, and other royal colonies had. But these British Colonies, *as such* Allegiance.

SECT. 5. Congress was first instituted, &c.

Sect. 5. never granted to, or vested in, Congress, a particle of power. All the power Congress had before July 4th, 1776, was derived from *the people*, acting in a *revolutionary* condition, in counties, and committees; and representatives acting as *committees;* excluding the royal governors and councils, their *constitutional* fellows in colonial legislation, &c. If, before the Congress of 1774 was elected, and so formed and organized as to receive permanent powers (as was the case) there had been Thirteen Colonies, formed and organized to receive and grant powers, as that in New Jersey was July 2d, '76, then that first Congress might have received its powers from the *legislatures* in the organized colonies, and which Mr. Jefferson shews he would have called *States*. He would have been correct, if facts had supported him, but they did not. Facts most clearly prove that Congress was the first American body, organized to receive, retain, exercise, and transmit, the powers of government. For, in its Journals of 1774, it appears that the people in 12 Colonies, in the months of June, July, and August, of that year, *in counties, by committees*, and *representatives*, acting *as committees*, elected the members of that Congress, and vested in it extensive powers, solely on *American* principles. Congress being made thus the *first* organized body to advise all the people, *to resolve*, and even *legislate*, is a material point, and subverts all Mr. Jefferson's fine notions of a *Virginian complete, continued nation*, from 1607 to this day. In many of the colonies, there were no bodies organized to receive, exercise, or grant any powers of government, till late in 1775; which was months after Congress assumed, by common consent of the people, very extensive powers, as will be shown in subsequent pages. All these extensive powers were granted, and admitted, on the principles of *consolidation*, and not on compact among Colonies, or States; for in June, &c. 1775, no Colonies or States, existed, organized on *American* principles, on which to make *compacts federative*, or any other. This showing *priority* in the General Government, is very essential, as it proves that the very *commencement* of our independent system was popular, and confirms the true positions of Webster and others, that the Constitution "*is* not the creature of the State Governments"—but "the *independent* offspring of the popular will." The people commenced its institution, and not the Colony or State Legislatures, for none properly existed, to begin to constitute it. The reader will see in the subsequent remarks how completely Massachusetts was in the right in 1780.

On the resolution moved by Mr. Foot, I am glad to find the essence of Mr. Rowan's opinion in two points, if I understand him.

Sect. 6. Rowan's opinions as to amendments. Mass. sued 1793.

1st. He says the States have *power of right*, that is, *constitutional* power, to control and limit the General Government, in all its branches, by amending the Federal Constitution, as provided for in the 5th Article in it. To this I entirely assent. This was the very course adopted by Massachusetts in 1793, when she was sued by an individual. Her proper magistrates, who were summoned in the case, refused to answer to the action; her

governor immediately assembled her legislature; which, at once, adopted a regular course to get the Constitution amended. This was done, and the Supreme Court of the United States, as well as other courts of law, were prohibited to sustain an action brought by an individual against a State. Ever since, that court has conducted accordingly. But it seems the amendment process is too slow for Senator Hayne, of S. Carolina.—Also, he observes, that this process requires constitutional majorities, and they may not be obtained. Then, in his opinion, the very remedy the people have provided to amend and preserve the constitution, must be neglected, because too slow for him, who, speaking for the State which he represents, says, "the sovereignty of the state is never to be controlled, construed, or decided on, but by her own feelings of honorable justice;" he thinks too, her legislature can, "by its own sovereign authority, annul an act of the General Government, which, it deems, plainly and palpably unconstitutional, and each and every state can do the same." On the other hand, Mr. Webster holds that "there is no more authority with them to arrest the operation of Congress, than with Congress to arrest the operation of their laws." And it here may be asked when did Congress ever claim a right to arrest them? But the Senator professed to ground himself on the Virginia resolution of 1798, which is in these words; SECT. 7.

SECT. 7. Virginia Resolves of '98.

"That this assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government, as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, and no farther valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them." (Answered by Massachusetts, Jan. 1799.) It is admitted the States may interpose. Massachusetts, as above, did interpose to good effect. So, she, and a majority, or all the States might have interposed by remonstrance; and if the acts of the General Government became so very oppressive, and obstinately adhered to, as to justify a revolution, the people may commence one, and resist as we did in 1774 and '75. The people, as already shown, not their legislatures, then began the revolution. We admit the people may, if they choose, throw off any government, when it becomes oppressive and intolerable, and erect another. If we are to judge from the actions of Virginia in 1798, 1800, 1810, and 1829, and not merely her words, she meant no more, than, we admit; she meant not state legislation enforced by arms, nor a Constitution interpreted "by her feelings of honorable Justice."

Not a case is to be found in New England to justify, in the least degree, the S. Carolina doctrine. Even in the oppressive case of the embargo, where the laws were supposed clearly unconstitutional, the question, if constitutional or not, was re-

SECT. 8. ferred to the Judiciary, that decided they were, and Massachusetts acquiesced.

We now come to Mr. Rowan's 2d point, Delaware. Delaware, he says, is as sovereign as Russia. Russia stands alone; is, in no sense, a part of any other nation, or *political* family, so as in the least to be bound therein. She has original, absolute sovereignty in her people. She, too, has, in herself, *delegated* power, placed in her emperor, usually called sovereign power. This, on our principles, may be modified or limited by the people, as they please, and by a majority assembled in person, or by their agents, in one place and city, or in fifty provinces. The last mode of operation was lately seen in Virginia. Her freemen, in their respective counties, appointed their agents. They met in Richmond, and, by a *majority of votes*, not by *compact*, formed a *constitution*, not a league, treaty or confederacy, and sent it to the people, to be ratified or rejected by a majority of the voters, in their county assemblies. They ratify it. What is this instrument, a *constitution ordained and constituted*, or a compact among one hundred counties? Clearly one entire act, law, and rule of conduct, *ordained and constituted* by the Virginia people, by a majority, and this formed as they saw fit.

SECT. 8. How is Delaware as sovereign as Russia?

What was Delaware when a Colony? Did she stand alone, and sovereign, as Russia stands? Certainly not. She was a subordinate member of the British and American, national, political family. Therefore, when a colony, she had no power to make war, or peace, or treaties—to decide the legality of a capture made on the ocean—or to act on any matter, *external*. Neither had she the power of right to act, or decide, in numerous other matters *internal*. In some matters, however, she was sovereign when a colony; clearly so, in the sense in which the supreme judges in South Carolina have said, that the city of Charleston is sovereign and in the sense in which a husband is the sovereign of his wife. On the Fourth of July, 1776, Delaware was made a free and independent State. But how, and what sort of a State. These are the true questions, and they are easily answered. The people, (that is the voters) of the *thirteen colonies*, some in one way, and some in another, in their original sovereignties, empowered their agents in Congress to declare them, and make them such States. They did so by a large majority of votes, and the effect would have been the same, if the declaration had been made by the votes of seven colonies only, as all agreed that the question should be decided by vote. Obviously, there was no compact, league, or treaty, among thirteen colonies to become States. This Declaration was one entire act, not divisible, made and established as a statute is; and would have been valid, if made in the manner and form a statute is. In all this, the people of Delaware, in their *original sovereign capacity*, joined in federal union, and in this manner the *national union* commenced. The other question is essential; what kind of a State was Delaware made on the Fourth of July, 1776? By this Declaration the people of Delaware, at the

Delaware when a colony.

very same instant, were divorced, and freed from their British subjection and connexion, married into the American family, and, by their full consent, brought under federal subjection and power, which was vested in Congress, and exercised to many purposes. Hence, there has never been a moment since they were so made a State, when they had power of right, to make war, or peace, or treaties, or to exercise any one of many other powers, which were properly vested in Congress and the Union. The truth is, we all, too often use the word sovereign in a vague way, as it respects both the General and State Governments; a way which has long created, and kept up a sort of federal, and especially state delusion. SECT. 8.

Mr. Rowan's idea, that sovereignty is indivisible, may be true as to original, supreme sovereignty in a secluded people. This is nothing to the purpose, as all agree it can make and unmake, control or limit, all government at pleasure, where not self restrained. But theory, experience, and indeed necessity, amply prove, that a people standing *alone*, as in Russia or France, or in a family political connexion, as in our States, do give and distribute, almost *ad infinitum delegated* power or what is vaguely called sovereignty. In our system, a vast portion of it is placed by the people in their original, sovereign capacity, in their government, which is divided and placed, part in Congress, part in the Executive, and part in the Judiciary; and each of these portions is further distributed, exactly as is directed in the Federal Constitution. So a vast portion of it is placed in the State Governments by the people of each State, and divided in their original, sovereign capacity, among their state agents, as above, and as directed in their State constitution. We have seen how the Declaration of Independence made a colony, a State, in an instant, though the Declaration was produced by the people of 13 *colonies*, acting first separately, then jointly; that is, they acted separately in appointing their agents to decide and act for them in Congress, but the agents to act jointly in one room, so as to produce *one joint* entire act, which was the Declaration. This Declaration is no more a *compact* than it would have been, if all the people of the 13 colonies, by themselves, or by their agents, had assembled in one great hall, and made it by one vote. Whether an instrument is a compact, statute, or constitution, depends on the words and intention.

Judicial question.

Whenever there is a written constitution, and it is law, and a legislator or judge, or an executive officer has done an act he has no power to do, it is meant the constitution does not authorize the act; and whether it does, or does not authorize the act is ever a *judicial* question to be decided by the judicial courts, unless otherwise provided for. So has ever been the practice. The legislature makes law, is the lawgiver; an officer executes it; but the judge construes it. Almost every such question arises on *delegated* power, or sovereignty; such as the power exercised by Congress, or a State legislature.

Thus far, I have merely opened the examination into which we are drawn by Mr. Rowan's assertion, that Delaware is as

SECT. 2. sovereign as Russia, or New York; an error into which thousands have fallen. That the legislature, State, and people of Delaware, are as sovereign as those of New York, may be admitted at present; for the legislature State and people of New York, as those of Delaware, ever have been subordinate, in fact to the General Government, as will hereafter be shown. The material question, is this, is Delaware as sovereign as Russia? It will be shown in future pages that the strong ground was taken, and the true principles adopted, by the people of Massachusetts, in their *original, sovereign* capacity, in the year 1780, in the establishing of their State constitution. Then the confederation was not ratified, and Massachusetts included Maine. Yet that people in their said capacity, expressly declared at that time, in their bill of rights, that they made their State constitution in subordination to the powers vested, and to be vested in the United States, in Congress assembled. In that year the people of Massachusetts assembled in their respective town meetings, and, by majorities, elected their delegates or agents, to meet in one State convention, and form their constitution. The agents met and formed the constitution accordingly, and reported it to the people, and they (the voters) again assembled in their respective town meetings, and ratified, that is, in our style (adopted since 1786,) ordained and established it, as first, emphatically, expressed in the constitution of the United States—words unlike those of compact, invariably used in confederacies, and used in the articles of confederation.—In every part of those articles the appropriate words were used to make a *compact* or *confederacy*, among thirteen States. The ratifying votes of thirteen legislatures were taken and counted—the votes ascended no higher than to the *delegated* sovereignty, or power, vested in those legislatures for their ordinary purposes.—The higher votes of the sovereign people were not taken in any form.—But in ratifying the constitution of Massachusetts (and those of many other States) the votes ascended above legislative *delegated* power. Those of the sovereign people, themselves, were taken and counted man by man, voter by voter, in choosing their agents to form a constitution; and the *people themselves individually*, gave the essential or *ratifying votes*.—So in ratifying the constitution of the United States we trace the votes up *to the people themselves individually*. In the first article, 4th section, they, (that is the people of Massachusetts) use these words, to wit: "The people of this commonwealth, have the sole and exclusive right of governing themselves, as a free, sovereign and independent State; and do, and forever hereafter, shall exercise and enjoy every power, jurisdiction, and right, *which is not*, or *may not hereafter be, by them, expressly delegated* to the United States of America, in Congress assembled. Here is the sound principle. But as the people of Massachusetts *alone*, and in their *State* capacity, add the word *sovereign*, not in the Declaration of Independence they could not vary the meaning of it, by adding that word; or make State sovereignty and independence, different from what independence is, in that Declara-

The true ground taken by Massachusetts in 1780.

tion. Thus the people of Massachusetts, *expressly* acted, and even made their state constitution, and established it, in *subordination* to the powers, vested, or to be vested, in Congress. Exactly so in subordination have the people of every colony acted, since the continental Congress was first instituted. Indeed could they act otherwise? after they had first instituted that Congress, and vested in it the powers above described, by an exercise of their original sovereignty, how could they afterwards act in state affairs, but in *subordination* to those national powers, which were of course superior, and had been previously granted?

SECT. 10. The people of one state can never withhold from the Union power vested in it by all of them.

If it be asked how it appears, that the people, in their original sovereignty, instituted that Congress, the answer is, that Congress was created and empowered *de novo* by *the people*, acting, clearly not as *British* Colonists. There was but one way in which they could act, and create the Congress before July 4th 1776,—that was not as British Colonists, but in assuming their original sovereign power, and exercising it on *revolutionary* principles, in counties, &c. as before stated.

There is another strong ground for those to stand upon, who hold that state rights and powers, are subordinate to those of the Union. Thus we see from the commencement of the Revolution, on a national scale, the people of the Colonies and States, have conducted their respective *state* concerns, even made their state constitutions in the *acknowledged subordination* to the *delegated* sovereignty of the General Government, vested first in Congress, then in Congress, the President, and Judiciary of the United States. So far as the people, in their original sovereign capacity, vested powers in the Union, they bound that sovereignty; and must necessarily act accordingly in all other cases. *All* the people of the States established the Constitution of the United States in this capacity, and among other articles the fifth which binds them to amend it in the manner prescribed in that article. Hence, so far this sovereignty is bound, for they can exercise it, in no other way in amending or altering it. The original sovereignty can be bound by the grants of power, or by stipulations, as each individual binds, what Chief Justice Jay called, his true sovereignty, and Judge Wilson called his original sovereignty, when he joins in society under regular government. However original sovereignty in the people may be *entire*, they can grant *delegated* sovereignty in numerous divisions and forms, as may be seen presently. The people bind their original sovereignty in specified cases, by stipulating not to exercise it in those cases, for a time or forever. It is obvious, as things were conducted, the people of the 13 Colonies exercised their original sovereignty de facto when they created the General Government, before July 4th 1776. *It is clear the people of any one State alone, never can take, or withdraw power from the Union* which was granted to it by all, as the people of *all* the states can do rightfully in a justifiable revolution, or as the people can do, in the manner their Constitution prescribes, for instance in the said fifth article relating to amendments. The people of *all*

SECT. 11. the States, or the *constitutional* majorities can transfer power from one or more states to the General Government, even against the consent of a *constitutional* minority—as where a State opposes, or even six States oppose eighteen States, and constitutional majorities in Congress, and states can, on the 5th Article, transfer power from the one or six States to the Union, or take back power.

SECT. 11. The Confederation limited state power.

So the Confederation limited state power of every kind, as far as power was transferred by it to the General Government, leaving state powers limited. Thus before, and under even the old Confederation, power of every kind, left in a State to be legally exercised by the people, in their state condition, was very much limited; so that no State, or the people of it, were fully sovereign or independent, as they would have been, if they, alone, and wholly disconnected, had achieved their freedom and independence, and preserved it separate, and solely to themselves. But the Confederation transferred only *delegated* power from State legislatures to Congress. The sovereign power of the people was not exercised by them, *as a people*, in the case. In this, the confederation essentially differed from the Constitution, as in establishing this constitution, the people of the United States exercised their original sovereign power.

SECT. 12. The Constitution of the United States its history, &c.

We now come down to the Constitution of the United States. In 1787, Congress consenting, the State Legislatures of twelve States, appointed delegates, or agents, to meet in convention.—They met, and formed the Constitution of the United States, as a committee, or any other competent persons, might have done, for it received its validity and binding strength solely from the ratification of it by the people, or in its own language, by their ordaining and establishing it, by the exercise of their original sovereignty, in its full strength, in a form and manner, all understood and assented to. In virtue of this sovereignty, they elected in their several counties and towns, their delegates or agents, and authorized them to act for them. The agents assembled in their respective state conventions, which were appointed in the manner advised and agreed to; and the people, by them thus expressed themselves, "*We the people of the United States*," "*do ordain and establish this constitution*," &c. and as soon as it was *ordained and established*, it became binding, and still binds every state that so joined in the ratification of it, according to the terms and expressions contained in it. It is, I conceive, immaterial whether those who made it so binding and obligatory on all, were assembled in one room, or in thirteen, or whether they established it by one major vote, or by thirteen major votes. The people who did ordain the constitution of Massachusetts in the year 1780, were assembled in several hundreds of rooms, halls, or town houses, and ratified it by as many major votes. So has been the course, in substance, in forming constitutions generally. Yet the instrument when established is a *constitution*, or thing constituted, not a *compact* or *confederation* and it ever remains a binding contract.

This Constitution is our third national government, insti-

tuted by identically, the same people, by which the other two, the revolutionary and the confederate, were, so that all three have been derived from the very *same source of power* to form governments, and to enact laws, and *so de facto* and constitutionally, there has been the same allegiance. To all which Mr. Jefferson's principles applies; that is the forms of the government may be changed and not change *the laws* and *power* of government—his principle was correct; but facts totally failed to support him in the case he put as has been above shown. Therefore, the laws and treaties made, and the powers acquired by the general government, by and under the first and second forms, remain under the third form, so far as they have not been withdrawn by the *whole* people. As it is, perfectly, clear *a part* cannot withdraw power *the whole* granted.

When the Colonies in 1774—5 as parts of the British nation and subject to the British Government, acted *as a people* in instituting Congress, and vested in it, by common consent, full powers to make war and peace, and treaties, to create and command armies and navies; to make prizes, and condemn them; to borrow monies and issue bills of credit, and pledge the faith and resources of the nation, to pay and redeem; in fact, to manage all national concerns, and between colonies and States to manage many *internal concerns*, as in acting in numerous cases *on individuals*, in colonies, states, counties, towns, and parishes, on the authority of the people, as one who "engaged in one common cause," in the nature of the case, there arose a sacred obligation on all, to stand together. No one colony, state, or party, had any right whatever, to dissolve the obligation. In this state of things, in an arduous war, waged to effect a common purpose, this Congress, duly authorized, on the Fourth of July 1776, by one entire act, declared, "that these *United Colonies*, are, and, of right, ought to be, *free and independent States*, and that they are absolved from all allegiance to the British Crown." It is to be observed, that this entire act alone, made the several states free and independent, not their own separate acts; that this act alone, discharged the Colonies "from all allegiance to the British Crown;" and that the word sovereign is not in this Declaration of Indepedence; and in but two of the 24 State constitutions, and in the Articles of Confederation. This colonial allegiance was continued legally on *American* principles, to July 4th, 1776, and is so viewed in that Declaration, and on *British* principles, to the peace of 1783. By this entire act, the colonies, in a moment, were caused to pass from their British, into their purely American condition. After Sept. 5th, 1774, *the people* submitted to, and supported Congress, to all the purposes, the existing exigencies required, and were assumed by that national organized body. The Colonies, *as such*, could not exercise, and individual states never did exercise, for a moment, the national, and other powers, which the people vested early in Congress; they never existed a second, but in a *limited* condition; therefore, never, for an instant, did they, or could they, as colonies or states, make peace, or war, or

It is very clear that the general government had less power under these articles of confederation, than it had under the prior *revolutionary* system—under that no vote of nine states was required—It is clear that the source of power, the people, in federal America, and the principles of Allegiance have been the same from 1774 to the present time as to the union, and from July 4th, '76 as to the states, except that the addition of Louisiana and Florida has made some difference—However both have been added since there has been any change in the forms of the General Government—all the three forms the revolutionary, confederate, and the constitutional took place while the source of power, the people, &c. remained the same. Hence on the principle before stated, the forms of the General Government could be changed, and its powers and laws and treaties remain the same. SECT. 14.

There was a great change from the Old Confederation to the Constitution of the United States. This was *ordained* and *established* by the *people* of the United States, in their original, sovereign capacity; acting so by common consent—that was, a *confederation*, which was ratified by the thirteen State Legislatures, acting under *delegated* sovereignty, only called at the time, and ever since, a confederacy among thirteen States. It acted on states generally, that is, *States* so free and independent, as before described. The *Constitution* acts on *individuals*, as explained in the General Abridgement of American Law, [Chap. 187, Article 20, Sect. 13—22. Vol 9th—thirteen numbers respecting state suability, were written in June, &c. 1793, and read by many in manuscript.] There are many other essential differences, all so well known, that they need not be named here. In the said sections, 13—22, it is shewn that the idea of thirteen, sovereign, *confederated* States, was kept up constantly in practice, especially in our treaties with foreign nations—not so under the Constitution. It is clear that the General Government never acts on states, *as such* except in two or three cases. In the cases, stated in the said sections, it appears that Gen. Bright and his militia, which were ordered out under state law, resisted the United States' marshall,—they were prosecuted in the Federal Judiciary, and punished, on the ground that they acted under state law which was void. In that case the General Government made no attempt to act on, and coerce a state as a state; but the power of the state to make law was decided on, as it has been, and must be, in scores of cases, from the nature of things, in actions between, and prosecutions against *individuals*, both in federal and state, supreme and inferior courts. It is impracticable for the judicial power, regularly to move on without taking cognizance at times, of all sovereignty. The original sovereignty of a whole people, must be noticed as the fountain of all delegated power. SECT. 14. Change from the Confederation to the Constitution.

The Constitution of the United States is established in the same manner, on the same principles, and in the same sense, a State Constitution is, as will be shown presently. No state constitution is deemed a *compact*, or a confederacy, or contract,

giance, commit treason, take an oath, or be punished. This may be true. [One point insisted on, in the 13 numbers,] above referred to. It is not necessary, that a state, *as a state*, should owe allegiance, &c., nor can a common corporation, *as such*, owe allegiance, commit treason, take an oath, or be punished, in the sense in which an individual can be punished; but it may be compelled to perform its promises and duties, by taking from it, its corporate property, by way of fines, or of execution for its debts; or it may be dissolved. Perhaps, so may a state be punished by taking its property from it by judgment and execution, clearly, where it submits to be a party in a suit, and fails in its duty. The General Government, however, has ample remedies in all, or nearly all state cases, against the men who compose the state: for, as the judges said in the action against the state of Georgia, the state must always act *by men*, and they can always be punished, if they do what they are not legally authorised to do. Before *state* suability was taken away by the eleventh amendment of the constitution, the Supreme Court of the United States decided in the Georgia case, that a state was suable on its promise, by an *individual*. The amendment took away that suability, only where the suit is commenced against a state, by citizens of another state, or by citizens or subjects of any foreign states; hence, it seems to follow that a state may be sued by the United States, or by another state, to compel it to perform its promises, and its duties and judgment may be rendered, and execution issued, and extended on *state* property. It is believed that a private corporation is viewed as an individual is. So, if the United States employ a man to pull down my house, when they have no power to do it, and he pulls it down, they may be punished in him. This man may be made either in the State or Federal Judiciary, to pay for it.—On every principle they must indemnify him. In the nature of the case, their power (or sovereignty) to authorise the act, comes in question, and must be decided. How absurd it would be to stop the suit against the man, by saying to the court, this sovereignty is too high for the court to notice.

Who owe allegiance, States and U. States punished in their property and citizens.

In our complicated system the very same persons, who are citizens of each state, and owe allegiance to it, are also citizens of the United States, and owe to them *superior* allegiance; as allegiance to the whole nation must be superior to allegiance to a part of it.—If so, a citizen cannot plead his *state* allegiance to excuse or justify a breach of his *national* allegiance, but this he may plead to excuse or justify a breach of his state allegiance—whether so superior or not is a question peculiar to systems like our's.—Treason and allegiance are closely connected.—There can be no treason where there is no allegiance, as that is a breach of this—that allegiance to the union is so superior and must prevail in cases of collision, and one must yield is further proved thus,—First. State allegiance is created by and rests on state laws, and state constitutions, as do state duties and protection; but *federal* allegiance is created *by* and rests on the constitution and laws of the United States, expressly declared to

both adhering to, and supporting his federal allegiance? In fact it can be dissolved by his consent, they opposing, but this is on the ground he has a right to expatiate and the better opinion is, that this right is not a part of our system.

I state in these pages but a few of the insuperable difficulties that must ever prevent constitutional nullification, or a separation, but by common consent or by force.—If not by consent, it must inevitably fall into the course which the revolution took.—It is delusion, gross delusion to believe nullification or separation can be seriously attempted and go on and end peaceably.—If a mere separation be agreed to, the public debts, and especially the vast national property, will produce heated contests, collisions and force. As to nullification, for seven years, it was amply examined by different names, in the Eastern states, and it was found, that nothing could be made of it, but by force or separation, neither of which was ever seriously proposed as will be shown.

Sec. 16. State Constitutions adopted 1776-1777.

In the constitution of *New Jersey*, adopted July 2d, 1776, the continental Congress is called the "Supreme Council of the American Colonies," and it is said that "a dissolution of the government in each colony" had taken place.

The constitution of *Maryland*, adopted August 14th, 1776, says, "that the people of this state ought to have the sole and exclusive right of regulating the *internal* government and police thereof."

The constitution of *Virginia* was adopted July 5th, 1776; it is a mere organization of the branches of the government, and makes no mention of state or federal power.

The constitution of *North Carolina* was adopted December 18th 1776. The state power is expressed in the very words used in the constitution of Maryland, cited above. Both are confined to *internal* government, recognising the General Government.

The constitution of *New York* was adopted April 20th, 1777, on the recommendation of Congress. The word *sovereign*, as applied to states, is not found in either of these constitutions, nor in that of Massachusetts, yet these six are the only state constitutions now existing, which were adopted before the constitution of the United States. Rhode Island is under the old charter, hence 17 of the 24 state constitutions have been adopted since the federal constitution was.

Sec. 17. 17 State Constitutions since 1789.

This is of some importance, because in 17 states, the people granted their state powers, while that constitution existed, and *subordinate* thereto, and expressly known as well as its acts and treaties, as the supreme law of the land, and so universally recognised.

The word *sovereign*, as applied to a state, was first adopted in the confederation, in the 2d article, and discontinued with it, except in New Hampshire. The constitution of New Hampshire, adopted February 1792, is the same as the said 1st art. 4th section of the Massachusetts Bill of Rights.

The constitution of *Connecticut* was adopted September 15th, 1812. "The people ordain and establish it;" that of Vermont

SECT. 17. was adopted July 9th, 1793. It is said, 5th art. 1. chap. the people "have the sole, inherent and exclusive right of governing and regulating the *internal* police of the same." See the word *internal*, above referred to in the case of North Carolina.

The constitution of *Pennsylvania* was ratified September 2d, 1790. In it we find the very words used in establishing the constitution of the United States. "We, the people of, &c. ordain and establish this constitution," &c.

The constitution of *Delaware*, adopted June 12th, 1792. "We, the people, hereby *ordain and establish* the constitution," &c.

The constitution of *South Carolina*, adopted June 3d, 1790. "We, the delegates of the people, in general convention met, ordain and establish this constitution."

The constitution of *Georgia*, adopted May 30th, 1798, ordain and ratify &c.

The constitution of *Louisiana*, adopted January 28th, 1812. "We the representatives of the people *ordain and establish*," &c. "*free, independent state.*"

The constitution of *Kentucky*, adopted August 17th, 1799. "We, the representatives of the people, of &c. in convention met, &c. do *ordain and establish* this constitution, &c.

The constitution of *Ohio*, adopted November 29th, 1802. "We, the people of, &c., do *ordain and establish* the constitution, &c."

The constitution of *Tennessee*, adopted February 6, 1796. "We, the people of," &c. recognising the constitution of the United States, and the ordinance of July 13th. 1787, do ordain and establish "the constitution, and agree to form ourselves into a *free and independent* state."

The constitution of *Mississippi* adopted August 15th, 1817. "We, the representatives of the people of," "do *ordain and establish*" this constitution &c. and agree "to form ourselves into a *free and independent* state."

The constitution of *Indiana*, adopted in convention June 29th, 1816, is thus. "We, the representatives of the people of," &c. (recognising the constitution of the United States, and the said ordinance of July 13th, 1787, &c.) "do ordain and establish" this constitution &c. and do agree to form ourselves into a "free and independent state."

The constitution of *Illinois*, adopted August 26th, 1818.—The people of *Illinois*, by their representatives in convention (recognising the constitution of the United States, and the said ordinance) said, "we do ordain and establish," this constitution, &c. and agree to form ourselves into a "free and independent state."

The constitution of *Alabama*, adopted August 2d, 1819, is, "we, the people of"——(recognising the constitution of the U. S.) "do ordain and establish" this constitution, and agree to form ourselves into a "free and independent state."

The constitution of *Maine*, formed in convention, October 29th, 1819, established by the people in their town meetings, is,

"we, the people of Maine," do agree to form ourselves into a "free and independent" state, by the style, &c. "and do ordain and establish" this constitution, &c. SECT. 18.

The constitution of *Missouri*, was adopted in 1821. No doubt the principles of it are the same as those of Louisiana, &c.

Sect. 18. The word sovereign why rarely used in our system

Thus we see, in the seven last cases, how the words, "*free and independent*," first used in the Declaration of Independence, and in that only, until February 6th, 1796, then and afterwards, were adopted into 7 state constitutions, expressly. We see, also, how the people of these states agreed to form themselves into such states—further, how the people of 15 states, have, in imitation of the people of all the states, in their Federal constitution, adopted in their 15 state constitutions, the mode of establishing them, and, especially, the words, "we, the people of —— "*do ordain and establish*" the constitution.

Now why has a state never been said to be *sovereign*, but in the old confederation, and in two only of 24 state constitutions? In those (Mass. and N. H.) the word *sovereign* or *sovereignty*, is expressly shown to be used in a *subordinate* sense—that is, state sovereignty is, in the two cases, expressly viewed as being in *subordination* to the powers of the General Government. The answers are obvious. It is at once seen, that Delaware is not so sovereign as Russia, but the United States *as a nation* are; that, state power is very much limited; that in the division of delegated power among many branches in the Government of the country, as General, State, &c. only *limited* power is vested in any one part or branch, and that is not *sovereign* in the true sense of the word. Hence, neither Delaware or any state is properly sovereign; but the United States, the *American nation*, France or Russia is completely sovereign. It is only a visionary, metaphysical sort of reasoning, that makes a *state in a union of states*, under and subordinate to it, as sovereign as the whole *union*. Though the nation is sovereign, the power of the General Government is limited, and so strictly, and accurately speaking, is no sovereign. The word sovereignty, used alone, no doubt means such sovereignty as is that of France or Russia.

SECT. 19. Congress not the common arbiter nor a State. Legislature.

Mr. Rowan and others are understood to assert that Congress is the proper body to construe the Constitution of the United States, in certain important cases, involving state rights, state and federal sovereignty. This is perceived at once to be in direct violation of one of the fundamental principles of our system, which prohibits the *lawgiver* to *be judge*. What is still more absurd than the Delaware sovereignty, is this reasoning, that the lesislature of any State in the Union, acting under *delegated* power only, can *constitutionally* construe, in the last resort, the Constitution of the United States, and as to such state, decide acts of Congress are void, and not binding on such state—and all this, in cases supposed to be above the jurisdiction of the Supreme Court of the United States. That is, the *legislature* of Delaware can construe the constitution of the United States, and administer *judicial* power better than that court can do, or can judge in cases of high importance in which that court can-

as they are afterwards used, they produce only state delusion. In this business each large minority has had its turn. SECT. 24.

On the whole, on *constitutional* principles, we may lay aside the words *sovereign* and *sovereignty*, in application to individual states, as having ceased with the confederation, in the time of which, only, it was correct to use them as *constitutional* words. It is the same with the word *federal*, as it is not used or recognized in the Constitution of the United States; nor are the words *confederation* or *confederacy*, though all three are convenient words in popular speaking or writing. But it is said the same words, as, " We the people of —— do ordain, &c." may in some circumstances mean a *constitution*; and in other circumstances a *confederacy*. It may possibly be so, but every part of the Constitution confirms the plain meaning of these words,, " We do ordain, &c." The word constitution is, invariably, preserved in all parts of the instrument—and if those who formed it, and the people who established it, meant a *compact*, *federative compact*, confederation, or confederacy, it is strange indeed that they totally omitted all these words. The word confederation is used only as it respects two states, &c. confederating, and the debts of the old confederation. Hence it may be affirmed, if the constitution was intended to be a *confederacy*, or a federative compact, every word was omitted which was proper to make it such—and such words were used as were proper to make it a constitution, and such a constitution, as is established in each state. The more this subject is examined, the more clear it appears, that the Constitution of the United States, ever has been called by its right name, and is in reality nothing but a constitution; and the claims, which some states make, to treat it as a confederation among twenty-four states, each as sovereign as Russia, Prussia, or France, are totally groundless. If it is a compact or confederation, it is among the twenty-four states only, the Union is no party to it, nor can it be one, but it is something the people of these states, at first thirteen, have framed and built up, called the Constitution of the U. States, and formed in it the organic parts, and vested in the various powers found in its several branches. On the doctrine that makes state *rights supreme*, the question is not, whether the *people* or *Judiciary* of a state, can in the last resort, construe the constitution in a legal manner, as to such states, but whether its *legislators* can so construe it. The advocates for supreme state legislative power, say, they have this power on the ground, that a state is as sovereign as Russia—and if Russia be one of twenty-four nations as sovereign as she is, and they make a compact or treaty, there being no common arbiter, Russia, alone, has a right and power to construe for herself, and annul, or consider it void, as it respects her; and, they say, if understood, our constitution is only such a treaty or compact among sovereigns, and Delaware and each state, has power of right to do so with it. But Mr. R. has not told us what authority in a state, is so to judge, annul or deem void; the legislature of Georgia have said, however, that it is the *legislature* of the state

Sect. 24. How some say State rights are Supreme.

rights, Mr. Livingston seems to be the most correct. He views the constitution in some degree, a federative compact, though mainly *a consolidated popular* government. In answer to Mr. Hayne, holding South Carolina doctrine, that if a state legislature thinks an act of Congress is palpably unconstitutional, it may, legally, prevent its operation within the state, and still may remain a member of the Union, and oblige Congress to repeal the act, or call a convention of the states to amend the constitution; Mr. Webster and Mr. Livingston, both in their published speeches, on said resolution, have so completely shown the absurdity of this doctrine, I need add nothing. Mr. Livingston in answer to Mr. Rowan, holding a state's right to prevent the execution of an act of Congress, which the state should deem unconstitutional, and that sovereignty cannot be divided, shows the state's opinion is liable to the same objection of absurdity. So in answer to Mr. Grundy, "very justly denying the right of a state *legislature*, so to prevent," but "holding that a state convention can so prevent" as will be stated; he also, proved the absurdity of such convention. Mr. Livingston holds, that the confederation was, clearly, a compact between the States, and correctly, in one sense, that is, as a league, or a contract, but, in another sense, it was not a compact, and correctly; for he admitted it contained stipulations of a popular and consolidated kind; operating on *individuals* and not on *states;* as the powers vested in Congress *quoad* peace and war, treaties, and admiralty courts, loans, coining money, emitting bills and other powers, binding the citizens of all the states, *individually*. Mr. Livingston holds that "both federative and consolidated powers are apparent in the Constitution of the United States." As a proof of this he observes, that the States appointed delegates to the convention, and the people in each state, in convention, assembled by state law, ratified the constitution,—that it guarantees state existence, and state legislatures elect federal senators, and amend the constitution,—that the states existed before the constitution was formed, and "parted only with such powers, as are specified in the constitution"—that each state consented to it, and this made a compact with all—that the states adopted it at different times. These, he views as federal features. As to the state acts prior to the ratification, they weigh but little, as from that it received its entire validity. One people can ratify in several states as well as in several counties. A mere constitution is, in no sense, a compact. A constitution can guarantee, as a statute can, and either of them as well as a compact. State legislatures electing senators and amending the constitution, may be federal features, and important. In, one sense, the states existed before the constitution, but not in the most important sense. We must follow power, not form. It is clearly shown in these pages, that national and extensive powers were vested in Congress by popular consent, before state, local, and internal state powers were vested in the State Governments. As to the mere dates of the constitutions, we find 18 State Constitutions have been formed and adopted since the Federal

Court. This is the opinion of Senator Johnson of Louisiana. The constitution provides "that all duties shall be equal in all the States." SECT. 28.

The very loose manner in which the word compact is used, leads us to inquire what is a compact, as the word has been, and is generally used, and what is its true constitutional meaning?

The judges of the Supreme Judicial Court of Massachusetts, once held her constitution to be a compact of all the citizens with each one. What persons did they include in the words, "all the citizens, and each one?" If only the voters, then the non voters, a great majority, made no compact. If they included non voters, how did wives, minors, &c. make compacts? or consent, or even submit? The real case was, in the year 1780, the people of Massachusetts wished to have a state constitution, and to exert that portion of their sovereignty, or state power, which they then expressly said, remained to them all, and was not yielded to the union. Such of the voters, as chose to act, formed and ratified their constitution, as stated in a preceeding section.—In the correct use of language, can we say, that there was a compact made "by all with each and every one?" It is obvious that the voters acted *individually*, and the majorities ratified, ordained, and established, a constitution, a superior rule of conduct, a law to be obeyed, read and acted upon, ever after, as a law, not as a compact. Hence, all evidence as to its formation and ratification, was disregarded as soon as it became a law. Neither people nor voters thought of a compact, of an unknown all, with an unknown every one. They read in their law books only the constitution. A little reflection evinces, that there is no foundation for the idea of a compact, which ever requires a capacity to contract, and the contractor to be remembered as long as the contract remains in force. Therefore, applying the word compact to a constitution, only misleads. All these matters apply to our national constitution, which was formed and ratified, ordained and established in the same way, on principle. Voters, choosing to act in different places, by a majority of votes, elected agents; and they met in one convention, formed and reported an instrument, called a *constitution*. Voters, who saw fit to act, met again in different towns and counties, and by majorities elected their agents, to meet in 13 state conventions, and by major votes, given *individually* and not by states, to ratify, ordain and establish the constitution—they did so. The *ratification* alone gave it validity, and this was all done by *individual* voters, voting in 13 places by majorities, minorities individually opposing, absent persons and voters submitting, as far as any of them were legally able to submit. Voting, to ratify in different states, could be no more in principle than voting to ratify in different departments in France, or here, in different counties and towns; as, in such case, all is traced up to, and rests on the votes of *individual* men; and this no more made a compact, than the enactment of a statute by a major vote in a senate, and by a major vote in a house given at *different* times and in different places, makes a

Sec. 28. How is a State or federal constitution a compact?

National Constitution.

Sect. 28. compact. I repeat, the ratification alone was of any importance, and that was by *individual* citizens, voting in their natural sovereignty. It is otherwise as to amendments.—*Quoad* them, each state acts and votes by its legislature, in the only essential part, the confirming, *as a state*, and body politic. So the states aided and voted in ratifying the old confederation, using words expressing a compact. Amendments so confirmed, seem, at first view, to show a federative compact. So would be the fact, if they were confirmed by all the State Legislatures. But only three fourths of them are required to confirm;—a quarter may not join these, therefore need not enter into any compact; and so make none. Now is it not essential to constitute a *federative compact* among states that every one should join in it? This was the case of the confederation. It was no compact as long as only one of the 13 states omitted to join. There was no federal compact while Georgia neglected to sign; and several colonies, for some time joined but partially, and, only, after the national powers were vested in Congress. Such a compact could relate only to a separation from Great Britain, and the Colonies did not mean any, till 1776.

Ratification.

Amendments.

The great confusion of ideas there is on this subject of *forming* and *ratifying* an instrument of *Government*, which some call a *compact* and others a *constitution*, requires more elucidation. The difference, in many minds, is, in constituting the major vote which ratifies. In one case this major vote is required and counted, by *states*, as when 13 states acted in the Old Congress, the votes of seven were required, and counted, to make this major vote. In another case of the same kind, in ratifying the Federal Constitution, the major votes of *individuals* in nine states were required to ratify it, counting by *states*. Counting *individual* votes had been the same, as a majority of them was required in each, and every one of the nine states; the ratifying majorities put together, were, necessarily, more in numbers, than the opposing minorities put together. For instance, in New Hampshire, the ratifying majority of *individual* voters in the convention, was larger, and required to be larger than the opposing minority of such voters;—So, in every one of the nine states;—therefore, one is at liberty to omit counting nine states, and go a step higher and count the votes of *individual voters*, in the nine states, and find the nine majorities required, and, in finding them, he also finds the ratifying majority of all who voted, and as a mere consequence, the ratifying major vote of the nine states. When counties ratify such an instrument, the *form* is different, not the *principle*. In some counties, as lately in Virginia, the opposing votes were the most numerous. In other counties, the ratifying votes were, by far, the most numerous, (all the votes of individuals,) and the majority of all were ratifying votes; the only result, in principle and substance, which the case required. It had been the same, in principle, if the counties had been required to vote, and count votes, as in the case of the nine states, the final result to ratify must have been a major vote of *individuals* in all the counties.

It is a great mistake to suppose voting by states, to ratify such an instrument of Government, necessarily, makes it a *compact*, among states. Cases, otherwise, are stated in these pages. As for one instance, the Declaration of Independence was voted by *States*, yet, clearly, it was no compact among states. In fact, in the case of ratifying such an instrument of Government, the true and only question put to the voters is, shall this instrument (by whatever name called) be ratified. To ratify it, the very essence of all is that there should be more yeas than nays, given by the voters, each voting in his sovereign capacity, as Judge Wilson has observed. In short, to be accurate, a constitution, or any other instrument of Government, so often, for convenience, called the *original* compact, must have this individual sovereignty for its foundation, or it has none. However, great may be the numbers, who, by elected agents, legislatures, or in conventions, should ratify it, their power to do it must be derived from this original sovereignty of individual men, having *reason* enough to be voters and actors, not *feeling* which was so lately made the Guide in South Carolina. It has been often said if *feeling* and not *reason*, is to govern, men ought to resign government to women and children, who without doubt, have the best feelings. The feeling to rule, is it seems that of July and August in the south—a kind of Government not readily admitted by men, living far to the north. SECT. 30.

Ever after Congress met in September, 1774, it properly acted the part of a *superior*; conducted the war, formed the militia, passed resolves respecting trade, and prohibiting exports, and supplying the Indians—for putting the colonies in a state of defence, it *directed* New York, to arm and train her militia,—denying to a colony the right to petition the crown separately—granting to Washington dictatorial powers, and directing the colonists no longer to take the oaths to support the Royal Government, &c. In most of the cases, the resolves operated on *individuals*. Sec. 29. Some detail of powers in the 1st Congress.

As to the amendments to the constitution, if they are not made for the reasons above stated, on the *federative* principle, then, decidedly, and necessarily; that is, acted upon but in the elections of federal senators by the state legislatures—and the election of the President by the House of Representatives in Congress.—For when he is elected by the people and electors, the very essential act is performed by the voters, citizens as well of the United States, as of the several states, voting as individual men, and as the original, natural sovereigns;—When this act is performed, and their votes create the electors, all subsequent steps and measures are but the effects of this act, almost alone essential. If these citizens, so acting, make a good choice, all is well, if a bad choice, all is wrong. Every thing is *national*, not *federal*, which can be traced to the highest original source of power in a majority of the American people, acting directly or indirectly, as *one* people. The citizens of a state, never can be considered in the situation of the subjects of France, or of any single nation when these citizens of a state are also citizens of Sec. 30. Amendments, quere if federal.

SECT. 31. the United States, having their most important rights, and owing their most important duties as such.

In the French case, one party, *as one entire party, not as thirteen*, freed itself from these treaties, because, as alledged, the other party one entire distinct party as France was, had violated it.

SECT. 31. How thirteen States can make a Constitution, that is, not a compact.

I shall pursue the following course to show, that thirteen states named, acting by thirteen delegations, and giving thirteen votes, can make and establish one *entire instrument*, treaty, statute, ordinance, or constitution, (no compact,) just as well, as the British parliament can make and establish such an instrument. I have already stated, how the Declaration of Independence is one entire instrument, made and established, and in no sense a *compact*. For the purposes intended, I will consider the French treaty of alliance—likewise, the ordinance of Congress as to captures, the treaties of peace, and the Constitution of the United States. The French treaty of alliance with the United States, was made in 1778, when they had neither confederation nor Constitution. On the part of the United, States all have agreed, as all must have done, it was one entire contract, formed by their minister, and ratified by one vote in Congress, binding on the American people, *as one people*, as much so, as on those of France. The thirteen States, each named in it, acting by thirteen delegations, giving thirteen votes, concerned on the American side. No man deemed it a treaty or compact with each of thirteen states, and so as to them, *thirteen treaties or compacts ;* and had Massachusetts, by her legislature, in 1798, so viewed it, and had enacted that it was violated as to her, by the French government, and that she was entitled to a *thirteenth part of just reparation*, she would have been laughed at by all nations.

The ordinance of Congress respecting marine captures, was ordained as one entire act, law, or rule of conduct, and might as well have been *enacted* as a statute or such a law is, and with more propriety, than Congress *enacted* that the United States were freed from the French treaties ; yet thirteen states, named in the Journals, acted by thirteen delegations, giving thirteen votes, by states, formed and ordained this ordinance, which was mere *statute* law, and in no sense whatever, a compact among the thirteen states. This ordinance was formed and established under the confederation, in which alone were the states ever recognized to be thirteen *sovereign*, free, and independent states, and even in that, they were explained to be subordinate, as before stated. So the treaty of peace of 1783, was formed and ratified under the confederation, and each of the thirteen states was named in it. We may apply to this treaty the observation made *quoad* the French treaty. Many acts of Congress, and of state legislatures, and many federal and state judgments, were rendered, respecting this treaty of peace, and yet no one was ever absurd enough to view it as a treaty or *compact* with each of thirteen states, or in other words thirteen *compacts*, giving each by its legislature or judiciary, a right and power to view it

as such, and to enact, declare, or adjudge it violated, and therefore void as to the state that acted in the case; but every such act and judgment applied to the whole treaty as one entire contract, binding or not, the American people *as one people*, as it bound or not the British people, as one people. SECT. 32.

These, and other cases, amply prove, that the nature of an instrument, treaty statute, or ordinance, depends on the terms of it, and the intentions of those, who form and adopt it; and these intentions are mainly to be looked for in the instrument itself. Now, all the words, expressions, and terms, in the constitution of the United States, prove it is a proper constitution and not a compact.

The Confederation, the British treaty of 1794, and the territorial ordinance of 1787, prove four things.—1st. That thirteen states, in union, voting *by states*, can make a *compact* among themselves, a *confederacy*.—2d. A treaty with a foreign nation, entire and consolidated, and the people of the thirteen states, be, in the treaty, as much one people as those of the foreign nation. 3d. That a *governmental* instrument may be made by 13 states, in Union, and be no compact *among themselves;* yet a compact between them and others; and, in part, no compact at all, but statute law, mere rules of property, and of conduct, as are most parts of the ordinance—.4th. Each instrument, the confederation, the treaty, and the ordinance, provided for constituting judicial tribunals. The treaty enabled the parties to institute such tribunal, to decide on captures, &c. and the confederation and the ordinance, directly empowered Congress to institute judicial courts, with just such powers as each created. These, and many other cases, tend to prove that it is not the mere situation of the voters, the forms of the voting, but the words and terms of the instrument, that constitute its character.

SECT. 32. If the Constitution be a compact, who are parties to it?

To return to the great question,—Is this constitution a *compact* or not? If a compact, who are the parties to it? As I deny it is properly a compact, I need add but little on this head. If a compact, it is one only among the *individual* states, made by thirteen and extended to twenty four states. It is agreed, so far that if it is a compact, still the people of the United States and Territories, are known to foreign nations, only, *as one people*, in war and peace, in treaties, &c.; that is, *externally; internally*, as several, free and independent states, in a limited sense, explained in their State and Federal Constitutions. Are the people a compact to the party in either sense? Are the whole people viewed abroad as a sovereign nation? Is their General Government a party to it: and so as to be properly charged by a state legislature, with having violated the compact; leaving the state free to do as it pleases? Most clearly, the whole people, *as one people*, have never done any act to make them a fourteenth, or other party. The people, *as a people*, act only in their original, sovereign character. It is clear that the *General Government* has never become a party so as to bind the whole people, and make them so chargeable. The rulers, in this government, act solely under *limited, delegated powers*, so

Sect. 33. never can bind their superiors, the people, further than they have authorized these rulers to bind them. This brings us back to the assertion, that the people, *as one people*, have never delegated any such authority. If they have granted it, it is granted in the constitution, in establishing it. The people did this mostly, either in their individual state characters, or in their characters, as *one people—not in both*. They established the constitution by one act, by their agents in the several conventions. There is no pretence for giving such an act a two-fold construction; therefore the notion of a broken compact, made by the whole people, *as one people*, or by their agents, duly authorized by them, to bind them as a party thereto, has no foundation. Then, as the whole people, *as one people*, neither, by themselves, or their agents, in their general government, have made any compact, nor have ever become a party to any, they can never have broken any. It is clear, one to do so, must be a party. Then as there can be no breach, the pretence of a state to be freed, has no foundation, on the ground that another party has violated the contract.

If there is a plain truth in our whole system, it is this, that if ever all the people of the United States acted *as one people*, as viewed in foreign treaties, they so acted in ordaining and establishing the Constitution of the United States, not as a compact, but a constitution, in the sense in which a state constitution is understood. As *one people*, they could not form two parties, so could not form a compact—and as the people of *separate* states, they could not act as one people. Indeed, the people, *as one people* have never had competent agents in the General Government to contract for them internally, or make them a party to a *federative* or *internal compact*. Then, a compact between a state, or all the states, and the General Government, is out of the question. If the constitution is a compact among states alone, it is nothing to the General Government; unless it constitutes its agent to manage its national affairs as the confederation did the old Congress. If an agent should exceed his authority his act is void, but no breach of contract, as he makes none.

The Constitution expressly authorised the making of foreign treaties and *external* compacts, but no *internal* ones, and forbids them among two or more states. Art. 1st. Sect. 10th.

Sect. 33. Seventh Article in the Constitution making a compact, examined.

The 7th article in the constitution has been selected, to prove it a *compact* among the states. It is in these words, "The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states, so ratifying the same." If a *compact* was intended, here was the fairest opportunity to use the word *compact*, instead of constitution. But, here, as in all parts of the constitution, the word *compact* was carefully omitted, and the word *Constitution* invariably preserved. The convention had the old confederation before them, and surely if they meant a compact, confederation, or confederacy, or league of friendship, they would have used one or more of these words, so appropriate in all confederacies. Instead of do-

ing so, the convention avoided these words, as carefully as the framers of the old confederation avoided the word constitution. Nor does the word *between*, standing as it does, prove a compact, or confederation; nor was it used in forming the old confederation, but in connexion with the proper word, signifying contract or compact. Further, this word *between* was used only in relation to nine states, ratifying an event out of the question. Further, as the convention intended to preserve the separate existences of the individual states, to several local, internal purposes, it was not improper to speak of the establishment of the constitution between the states, so ratifying the same. Though, the instrument be a constitution, in fact, and not a compact, the word establishment, applies to it properly, and is so used, emphatically in the beginning, "We, the people of the United States, do ordain and *establish*, &c. and as far as it is proper to rely on criticising words, *establish* outweighs the word *between* very much. SECT. 34.

Suppose there are 13 counties in a state, and a state constitution is formed, and it is said that the ratification of the convention of nine counties shall be sufficient for the establishment of this constitution *between* the nine counties, ratifying the same, does the word *between* make it a compact among the nine counties? Suppose the instrument, be, in fact, intended a constitution and no compact, and to preserve the separate existences of the counties for special county purposes, what better word can be found than the word *between?* The word *among* is no better, nor is the word *over*. As in such case, the nine counties are but a part of the thirteen, the nine of necessity must be mentioned, and the constitution must, of necessity, be established between, among, or over them. This catching at the word between, is of a piece with the other compact, and appears like catching at straws.

SECT. 34. What is a State that separates itself, to claim of the public lands, &c.

If a state so separate, what is it to do—Shall it claim or not its part of the public lands, buildings, navy, shares in the bank, navy yards, and other United States property, of far more value than the national debts. If South Carolina should separate, what are her members of Congress, her judge in the Supreme Court, to do?

What question is a state legislature to decide, in order to such separation? Clearly a *judicial* question, for all agree that all the states are bound by the acts of Congress, enacted in *pursuance of the Constitution*, and that they are not bound, *if they are not so enacted in pursuance;* this, any person, sued or prosecuted, may plead, and show in his defence. It is not possible to make more than one question;—Is the act enacted so in pursuance or not? This has ever been, and must be, in its nature, made a *judicial* question. Does the constitution authorize the act? What has a state legislature, or even Congress to do, in the last resort, with this question? Are the twenty-four state legislatures, each by itself to exclude the Judiciary and the trial by Jury to sit in judgment, and make twenty-four decisions, some one way, and some another, as their opinions ever have

SECT. 35. been? I know of no state legislature that has actually assumed to sit in judgment on an act of Congress, and to decide that it is not so in pursuance, except that of Georgia. In that case, the decision remains a dead letter. A legislature may declare its opinion, as leading to amendments, and opinions are no decisions, judgments or decrees.

Congress is not the Judge.

The notion, that Congress is to decide the question, is doubly absurd. 1st. It must decide on its own act, and, if to annul, it annuls what it has said is valid, by its enactment of it. 2d. A legislature decides *a judicial* question, and the law-giver is prohibited to be *judge*, on the very fundamental principles of our whole system. It is generally bad in principle and practice for men to reverse their own decisions, publicly made, or to undo their own doings, after they have been published. We find by experience this is an up hill business.

SECT. 35. Ours is a mixed constitution—*sui generis* to which old names are often misapplied.

In fact, the Constitution of the United States is neither a *federative compact* nor a *confederacy*, a consolidation nor a *central* government like that of France; in which all delegated sovereignty is collected into one centre. The whole American system is *sui generis*, and exactly what the General and State Governments make it; therefore, old names and expressions do not always apply correctly. It is evident that the men who drafted the constitution of the United States, were aware of this, and hence omitted to use certain words which had been long used to express strong features in other constitutions and governments. The same is the case with several state constitutions formed since that was. The word sovereign is one, and the reason of its omission is obvious. In the many divisions of delegated power, to preserve many balances in our system, among federal and state governments, legislative, executive and judicial branches, vesting in each, only quite limited power, and as limited sovereignty (preserving the popular use of the word), this word *sovereignty* could not be correctly used without explanation. It was therefore deemed best not to use it at all; nor is it found to have been used in any of our constitutions, since 1792. The same may be said of the word *federal*. Federalism exists but partially in the system—no part is purely federal, though some parts partake of federalism.

Many wonder that Plato, who lived before Christianty appeared, should be the means of corrupting it more than any other man. On reflection, we, perhaps, ought not to be supprised. Thoughts, splendid, and dressed in eloquent language, usually captivate, though they may be loose and visionary; and such were his. Many able, pagan disciples of his, very early became christian writers. On proper examination, it may be found that thoughts like Plato's, so clothed have very much corrupted the law, therefore, wise ancients, aware of this, confined legal pleadings to plain narration of facts, and to reason and arguments clothed in the plainest style. It has already been observed, that many of the loose constructions of the constitution may be traced to Jefferson's writings. Plato's school, never in the Old or New World, however captivating, produced an accurate, close

thinking lawyer. Mr Jefferson truly (say his friends) was of this school. He, perpetually, applied the word compact to the constitution, as if frequently found in it; and he has been followed by thousands—by some ignorantly, by others, on democratic, party principles. A senator, (Mr. Woodbury,) in the debates in question, though more accurate than his master Plato was, several times called the constitution a *compact*, or a confederation, and acknowledged that Plato guided his political faith. As he said this in immediate connexion with the Virginia alien and sedition resolves of 1798, which he approved, by Plato he, no doubt, meant Jefferson. As working into religion loose and visionary notions, mere Platonic dreams, which are splendid and deluding, corrupts it, so misusing words, and working incorrect ideas into the law, corrupts that, and produces vague, popular notions. Of this sort, is teaching men, in a hot climate, to be governed by "*feeling*," instead of *reason*, and to act on "the *feelings* of *honorable* justice, in construing constitutional law, which Mr. Jefferson seems to have rightly understood, when he mentioned the hot-headed Georgian," who advised his subjects to stand to their arms, rightly, to interpret such law. SECT. 36.

If a state legislature, in the last resort, misconstrue the federal constitution, law or treaty, there is no removal, no impeachment, or other remedy, but in the future elections in the state, the legislature of which decides erroneously; but if a law court decide wrong, especially corruptly; there is a remedy, by removal in most cases, or by impeachment. Though a judge is not removable, impeachable, or punishable, for his innocent mistakes of the law, yet often his mistakes may be of such a nature as to prove an *illegal motive* or mal-administration. So often has been the case, and any illegal motive or mal-administration, in *judicial* or *executive* officers, is impeachable or a cause of removal; not so in the case of legislators. In the cases of Judge Chase and some others, there have been impeachments for very erroneous constructions of constitutions and laws, though no evidence of bad intention, but that which was inferred from such misconstruction.

SECT. 36. If a legislature decide wrong there is no impeachment, removal, or other remedy, &c.

As above stated, each state is an essential permanent member of the union. The general government is the head, and was first created by the whole people, and most of the *national* powers have ever remained in it, though its organization has been changed. The people of each, and every state, in their highest capacity, have ever submitted to be ruled by this general government, to all the purposes, expressly or clearly implied in their revolutionary system, in the confederation, and in the constitution. The general government operates, *exclusively* on all *external* subjects, and *concurrently*, on many *internal* ones; as the subjects of taxation, militia, &c. &c. So it operates, legislates, judges, and executes, on many subjects, exclusively, though in their nature *internal* and local, as before stated. For instance, were Connecticut, entirely independent, as Portugal is, post offices, coining money, &c. being subjects in their nature, *internal* and local in Connecticut, she would

SECT. 37. The States have retained but a part of *internal* objects, &c. essential that they be preserved.

Sect. 38. have the power of legislation thereon; but now she has not. Her people, in their sovereign capacity, have vested it in the general government. The several states have retained self government, only as to part, though a principal part of their local internal objects.

Though state legislatures have often declared acts of Congress, unconstitutional, yet no case is recollected, in which Congress has declared state acts unconstitutional, but, very properly, has left them to be decided by the Judiciary, state or federal.

Amendments.

As the state legislatures must take a part in amendments of the constitution, no doubt they may properly express their opinions of federal measures leading to amendments, as was done by Massachusetts and other states, 1793, and as was done, as many think, by Virginia, and some other states in 1798, '99.—It seems their provision for amendments, which has been resorted to more than once, so beneficially, and which saved the constitution, is too slow and uncertain and is spurned at in South Carolina by July speech makers.—Would not Mr. Jefferson if living call them, as he did the Georgian, hot heads? and would not a more close thinker, than he was, call them mad-men?

Sect. 39. The manner in which the people act in forming constitutions.

The people as a people, can act in no other than their sovereign capacity. They can never themselves act by *delegated* powers. They can never delegate power to themselves, and can never, but as agents, receive it from others. The people, in the several states, act separately, in establishing their several state constitutions, and those, who say the federal constitution is a compact, teach, that they act in the same separate manner in establishing that. We see that their acts in establishing their state constitutions produce no compacts, and that if they all act to establish one instrument only, it is immaterial whether they meet and vote in one room, or several. A legislature consists of two branches; the members meet and vote in two, and enact a statute. Their so meeting and voting had not the least tendency to make it a *compact* between them.

How one people.

The idea of some persons, that the people of one state are aliens to those of another state, has very little foundation—none as to those *external* and national concerns, which are under the management of the general government. In these, the people of the United States *are one people* and may well act together in ordaining and establishing a *constitution* for the whole—in no sense a *compact*, though assembled, and voting, by their agents, in their different states; as the people of a state may act together in ordaining and establishing a *state* constitution, in no sense a compact, though assembled and voting in their different counties and towns. Indeed, they have the advantage; for acting in *national*, *external* concerns, the whole people of the United States are under no restraints; but the people of a state, in making their state constitutions, are under some restraint, as we shall see presently. Indeed those persons, who thus view the people of a state, *aliens*, call the state a *sister* state. Internally, are the people of one state most alien to those of another, for, as well expressed in the state constitutions of Maryland, North

Carolina, and some other states, the people of the state have the sole and exclusive right, *internally*, to govern themselves. This is generally true, but not universally, nor in the sense that the people of France or St. Marino have the sole and exclusive right to govern themselves *internally*. The people of France, or of St. Marino, can, internally, coin money; make what they please a tender; impair the obligation of contracts; establish post offices, bankrupt laws, and rules of naturalization; construe conclusively *in all cases*, their own internal laws and constitution; alone tax themselves internally; pass bills of *attainder*, *expost facto laws;* grant titles of nobility; lay imposts on imports and exports; keep troops in time of peace, grant patents, &c. &c. None of these things can the people of a state do *internally*. How then are they sovereign as Russia? Thus even, *internally*, are the people of a state bound down by the express words of the federal construction, so that they cannot act at all on more than twenty important *internal* subjects, in any capacity. See Art. 1st. Sect. 10th, and other parts of the constitution of the United States. In support of state rights, it has been often times said, that the constitution is one of *specified powers*. This is true so far as its powers are specified. But these are, in general, unlimited powers, such as the powers of taxation; to raise armies, build navies, to increase, and forever keep them up; to multiply, and keep up forever, forts and fortifications, there being in these powers, complete power over the purse and the sword—So, the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, &c. Art. 1st, Sect. 8th. No. 17th. So this constitution is established to provide for the *common defence*, and to promote the *general welfare*. We may see how the great majorities, when parties, have construed these general words. There are other very general powers granted in the constitution. A power may be specified or enumerated in a constitution, yet be of the most sweeping, unlimited kind, as powers to tax, and keep armies and navies. It is, in fact, no limitation, that these powers are specified or enumerated. So as to borrowing money and contracting debts—as to forts, fortifications, &c. These mighty powers can be carried into execution by bare majorities. Such views as these, induced a writer in Oct. 1787, Jan. 1788, and June 1793, to write, at the request of the friends of amendments, three pamphlets. (Of the 1st, were four editions in three months.) These were in favor of amendments adopted, and further to guard against constructive powers, and in some few important cases, to prevent the oppression of minorities by bare majorities; most of which amendments have been made. We now see the effects of removals from office, the result of the casting vote of Mr. Adams, when vice president, then the great advocate of the executive power, then, too, in Washington's hands—a power which even the rigid scrutiny of the writer, just mentioned, did not spy out. On this casting vote, at any moment, from twenty to thirty thousand officers hold their offices, removable at the will and pleasure of any existing President, and when he pleases to fill

SECT. 38.

SECT. 39. States how limited internally.

SECT. 40. Remarks on powers in the Constitution specified in general.

Sect. 41. their places, at least *pro tem*, with as many of his friends, and give no reason whatever. This being publicly known to be the case, probably ten times as many hungry office seekers may be put in motion, to get offices; add their friends, and half or more of the presidential voters may be moved to slander, misrepresent, and deceive, to oust a host, and get a host into their places. Already even state Governors humble themselves, and join in office seeking. Compare this removing, and filling up power alone, with the decisions of the Supreme Court, and they will be found to be nothing in the business of corrupting the people, or in subverting the government—in giving cause to the complaints of treasury influence, so often justly made by nullifying amendments, or in keeping up a perpetual warfare about the loaves and fishes.

Sect 41. Common defence and general welfare how construed, 1802, &c.

In the Circuit Court debates in 1802, we find how the words in the constitution, "common defence and general welfare" were, and had been construed by prominent party men. It seems while Mr. Bayard was in the federal majority, he gave them a construction broad enough to control the *specified* powers, but, when in the minority, he limited his construction of the constitution, strictly to those powers, as Mr. Giles had done when in the minority; but as soon as in the majority he changed. Though he proposed to confine himself to a strict construction, he opened the way to a very broad one. He said he should discard, in his interpretation, "common defence and general welfare," as he considered these words as containing no grant of powers whatever, but merely the expressions of the ends or objects to be effected by the grant of the specified powers"—That is, I conceive, on a fair construction of his words, he would, in construing the specified powers, consider the common defence and general welfare, as the ends and objects to be effected; in other words, he would so construe the specified powers, as to effect or obtain the common defence and general welfare. Neither Mr. B. nor any other federalist, when in the majority, could aim at more than this. If Mr. Giles made the common defence and general welfare his end and object, he had occasion *only* to construe the specified powers so as to effect it—that is, according to the old papal faith so to use and construe, as to obtain the object in view. Accordingly, Mr. Giles attempted to prove that all power was in Congress, and the President, both then on the side of Mr. Giles, and that the Judiciary, then federal, and opposed to him, existed but at their will.—It is inconceivable how a true republican or a sound democrat can make every effort to limit and degrade the Judiciary, in our country, in which judiciary alone the all important trial by jury can be had—In which alone the opposite parties can publicly assert their rights by the known and safe rules of pleadings, and prove them by legal evidence, the Judge must admit, as the authorities prescribe; and in which alone are cases and proceedings, correctly reported and given to the public.—If any judiciary is not so organised as fully to possess the public confidence, experience will, in time discover the defects and the proper means of improvement. No nation

on earth has better means of improving the Judiciary than this, both as to Judges and Juries, reporters and others attached to it.

Sect. 42. An independent Judiciary is essential in our system.

In this section, I shall only endeavor to show that an independent Judiciary, State and Federal, is one of the three essential branches in our system of Government, and touch on the inquiry;—What is a judicial question? In other sections I shall attempt to show that one, and but one, *judicial* tribunal, a common arbiter, in the last resort, in the nation, is indispensable—that the Supreme Court of the United States is this tribunal—that, accordingly, ever has been the practice—and that so is the sense of the people.

1st. Is an independent Judiciary essential?

This is the only nation on this globe of 12 or 13 millions of inhabitants in which there are 25 constitutions and 25 codes of law, each multiplying questions, *judicially*, to be tried and decided by judges and jurors—tried, as usually juries must find the facts of the case, and often the law in general verdicts.

2d. This, also, is the only nation existing in which there are 25 Governments, each independent in its proper sphere—between each one of 24, and the General Government a balance is to be preserved, by truly discerning the checks and balances in the whole system, and wisely enforcing them.

3d. This is the only nation any where, in which there are 25 legislative, 25 executive, and 25 judicial departments, coequal, each one of the 75, generally, independent, in its proper sphere; and each, by wisdom, moderation, and accommodation, to be kept in its proper place.

4th. This is the only nation, in which each and every person is at full liberty, and usually disposed to assert his rights in equity and law; including constitutional rights and to have them tried and decided on by judges and juries, according to law. Here it may be observed that the judicial department includes, exclusively, all jurors, so by far a much greater part of the substantial freeholders of the nation than any other department. Therefore, when we truly say the Judiciary in a popular Government, is the sheet anchor and safety of the state, we include juries, as well as judges.

These few things alone (and many more will be thought of) fully show, as our reports amply prove, the multitude of judicial questions that must arise in our country, every year, and be peaceably decided in the Judiciary, or strife and contentions must make the people miserable.

I need not dwell on their independence in holding their office during good behaviour, as it is the wise and settled policy of the nation.

Many, in speaking of the Judiciary, seem to forget the juries, a numerous and very substantial part of our population, generally the select part of the democracy, the best men to temper and moderate judicial severity where it may exist. Next, what is a judicial question? On this, at present, I only observe.—Every question is a judicial one, properly to be decided by judges or

Sect. 42. juries, and even by arbitrators employed in connexion with the courts of law and equity, as most of them are.

For the purposes of these questions I may generally confine myself to *constitutional* questions.

1st. Every question decided by the law of the land, including constitutions and usages, is either legislative, executive, or judicial. We may first ask, is it legislative to be decided, finally, by the legislator, whose only duty in our system is to *make* law, unless otherwise constitutionally directed? If not legislative, then is it executive, to be decided by some executive officer, whose only duty, in our system, is to *execute* the law;—if not executive, then is it judicial? A jury is an essential part of the judiciary, must find the facts and often decides the law in general verdicts, &c. but neither the legislature or executive can ever have a jury.

2d. When we say, an act of Congress, or of a state legislature is made in pursuance of the constitution, federal or state, we mean *it is authorised* by the constitution, under, or on which, it is made, and we mean the constitution authorised the act, state or federal.

3d. If the question be, is an act of a state legislature authorised by a state constitution, it is a state question, and to be decided in the *State* Judiciary. This course has ever been, universally admitted and practised, there being no constitutional provision directing otherwise. I do not recollect an exception in our books.

4th. If the question be, is an act of a state legislature, or of Congress, authorised by the Federal Constitution, it is a *federal* question, to be decided in the Federal Judiciary, and which, in 40 years, has been decided therein, uniformly, 60 times at least, as stated above; and I do not find that it has ever been seriously denied, that either of them was a judicial question; but the objection has uniformly been in the few cases objected to, that the decision ought to have been the other way; for instance, the Court ought to have decided the Bank of the United States is unconstitutional. Most clearly, no executive has ever been assumed to decide such questions—nor, I think, any legislature or Congress, in the last resort, except the legislature of Georgia, and her decision remains a dead letter, never acted upon. All the 60 and more decisions remain in full force, and have made (except the two suits against states) less uneasiness among the body of the people, than a single act of Congress, as, for instance, the embargo or tariff act.

Constitutions and laws, without a Judiciary, peaceably to interpret them, are evils, for when numerous, as ours are, it is well known three fourths of the disputes grow out of them, and if there were no such interpretation by judges and juries, they would produce endless strife—hence, it is essential such a judiciary exist. It is impossible to do justice, or secure the rights of persons or property without it. "There are, in the Constitution, the grants of powers to Congress, and restrictions on those powers. There are, also, prohibitions on the States.

Some authority must, necessarily, exist, having the ultimate ju- Sect. 43.
risdiction to fix and ascertain the interpretations of the grants, restrictions, and prohibitions." [Webster 2d speech, p. 76.] There is also high authority to prove an independent Judiciary is essential. For 40 years, Congress and the people, have, invariably, established, preserved, and supported such a Judiciary without objection, except a few would make the judges more dependent. I may add, the Judiciary, State and Federal, including the juries, are, and ever have been, the safety and pride of the republic. Legislators have their merits, in giving, and executive magistrates in executing, the laws, not in *expounding* them.—This, in them, is usurpation.

When we consider the numerous *Judicial* magistrates, and especially two or three hundred thousand of jurymen, the solid and select part of the people in the Judiciary, exclusively, and others connected therewith, I hesitate not to affirm that there is more weight of character in the Judiciary than in both of the other two departments.

Sec. 43. A compact among States may well constitute judicial tribunals.

It cannot be shown the constitution is a compact between the State Governments.—The constitution itself, in its very front, refutes that; it declares that it is ordained and established *by the people* of the *United States*. So far from saying that it is established by the Governments of the several states, it does not even say it is established by the people of *the several states*. [Webster's last Remarks, p. 95—p. 93.] It was said, the Constitution is a compact *between States*, making the General Government the result of it, not a party to it—yet made it a party to it—so being a party cannot judge on the terms of compact. Mr. W. admitted, for argument sake, that "the constitution is a compact between states, still it may be so construed, and with certain powers, that it shall construe and interpret, for itself, the terms of the compact. It may be one of the powers granted by the compact, that it so construe it. If the Old Confederation had contained a clause, declaring that resolutions of Congress should be the supreme law of the land, any state law or constitution to the contrary, notwithstanding, and that a committee of Congress, or any other body, created by it, should possess judicial powers, extending to all cases arising under resolutions of Congress, then the power of ultimate decision would have been vested in Congress, under the confederation, although that confederation was a compact between states"—for the parties to the compact were competent so to constitute a *judicial* tribunal. In fact, the Old Confederation did vest power in Congress to constitute *judicial* tribunals; and the Old Congress did constitute, appoint, and organize, a judicial tribunal, that decided the important Wyoming dispute between the states of Connecticut and Pennsylvania; so that Congress constituted a *judicial* tribunal that decided, ultimately, on all captures in cases of appeals. If a compact among states, like the Old Confederation, it is their Government under which their agents are appointed by them, respectively to execute it. These agents may vote by *states*, as under the confederation, or *individually*;

Sect. 44. as in the present Senate. It is never executed as a compact or contract, but rather as a statute, ordinance, or constitution is, by major votes, as in a senate in one room, binding minorities assenting—therefore, unlike a treaty between two independent nations, which each party executes by himself.

Sec. 44. Common Arbiter.

I now come to the great question, what tribunal is the common arbiter to decide, finally, and in the last resort, if an act of Congress, a state statute, &c. is constitutional or not? It is believed hitherto, the Supreme Court of the United States, only, has decided such questions when recognised in the General Government, and the Supreme Court of each state, when finally decided in state jurisdiction. The Supreme Court in 40 years, has decided two acts of Congress unconstitutional—6 constitutional—9 state laws constitutional—26 unconstitutional—affirmed 14 state judgments—annulled 14,—(very few considering how many thousand statutes, and acts of Congress have been enacted, and how many thousands of state judgments bearing on laws, &c. of the Union, have been rendered in 40 years, by more than 20 courts, and more than 20 legislatures)—assenting to the appellate jurisdiction 7—acquiescing in do. 21.—States, parties, really and nominally, 6—incidentally, 4—opinions against the President, 2—in his favour, 2—against the Secretary of State, 2.

Supreme Court is.

[Senator Johnson, in his speech, p. 28,] adds. "The wise heads that framed the judiciary act saw this—that it *will often* happen that questions will arise between individuals claiming rights and powers under the two governments," federal and state, "and made the necessary provision of the 25th section. This presents an admirable system, perfect in all its parts, harmonious in all its operations, which establishes justice, insures domestic tranquility, and preserves the Union." "It has been admitted that the Supreme Court may decide all cases between individuals." p. 30. Do not these cases in some form or other, involve every kind of state power or sovereignty?

In these pages, by Supreme Court, I mean that of the United States—and I repeat the assertion, that this Supreme Court is the common arbiter throughout the Union. So hold Senators, Webster, Livingston, Johnson, Clayton, and most other Senators in Congress in 1830, of both great parties, and they show it must decide whether an act of Congress, is constitutional or not as to citizens, as is admitted in the States, so in regard to the states themselves.

This Court is ordained and established by the constitution, or not at all; for art 1st sect. 8th. No. 9 gives Congress power "to constitute tribunals inferior to the Supreme Court"—not this court, understanding, clearly, this is constituted by the Constitution. This our fundamental principles require, which require the legislative, executive, and judicial powers to be kept distinct forever; and, forever, to keep them distinct, each must be independent in its own proper sphere; and to be so independent, it must be established by the constitution. Art. 3d. sect. 1, No. 1, says, "the judicial power of the United States shall

be vested in one Supreme Court," &c.—Sect. 21 extends this judicial power "to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under this authority." To all cases of ambassadors, &c. admiralty, &c. "to controversies to which the United States shall be a party; to controversies between two or more States;" between citizens of different States; between citizens of the same State, claiming lands under the grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." In all these cases, the Supreme Court has, originally, by appeal, or writ of error, positively, jurisdiction. If an act of Congress arises under the constitution, or not, or in pursuance of it, or not, is often the very *judicial* question to be decided. If it so arise, or is so pursuant, it is *Supreme law* (art. 6th No, 2,) binding the judges in every state; "any thing in the constitution or laws to the contrary, notwithstanding."

It must be seen in these cases, state sovereignty, as far as any exists, must have been often, directly and necessarily involved. Sovereignty, as it exists in the State Governments, is only delegated, and a power to make and execute laws in sundry cases; subject always to many and essential limitations, found in the Federal constitution, and in certain fundamental American principles. I say, necessarily and absolutely,—for instance, two citizens of Vermont claim the same farm in that state, the plaintiff under a New-Hampshire grant, and the defendant under a New York grant. The plaintiff recovers in a Circuit or State Court—the defendant by a writ of error, carries the cause into the Supreme Court—this Court has no choice, it must decide the question the parties have a right to make—that is, which State had power to make the grant. It has been well observed that the two citizens and all persons claiming under them, are forever bound by the decision; and further, where the citizens of states are bound, these states themselves are bound, also. Now, in necessarily deciding on the power of a state to make a grant of land by its legislature or executive, is necessarily deciding on its delegated sovereignty. This, State Courts do, every day without objection. Yet some are ignorant or prejudiced enough to think this state sovereignty above judicial power; too exalted for judges and juries to look upon. But a state legislature must sit in judgment on its own grant or acts. Here it may be well to notice this state opposition, its origin, nature, and progress. The first opposition early arose in Congress, when it enacted a law respecting invalid pensions—and this Court decided it was unconstitutional. This decision naturally touched the feelings of those who enacted the law. The next case was an action against the State of Georgia, by a citizen, also, a like action against Massachusetts in 1793, before stated—in which actions the Court held a State was suable by a citizen, of another state or alien. This was considered a violation of state rights, and sovereignty, and produced the 11th

Sect. 44. amendment of the constitution. These cases opened the contests between State and Federal powers; and the contest was, between States and the Federal Judiciary.

In 1798, Congress enacted the alien and sedition laws, on which some were convicted in the federal courts; of course these laws were so far deemed constitutional. These acts and the decisions on them, produced a strong opposition, and the famous resolutions of Virginia and Kentucky, &c. declaring the acts unconstitutional, though on the whole, submitted to, and suffered to expire in 1800. In the alien and sedition cases, the question was between state rights and Congress. In the case of Marbury and Madison, it was between the Supreme Court in fact, and the President, Jefferson, in which case it was thought he improperly withheld Marbury's commission as justice of the peace. Thus, in a few years, this Court found it necessary and proper to decide against Congress, state rights, and the President on constitutional principles. So, in the course of 26 or 27 years, it had so to decide many very important constitutional questions, against the claims of state rights, arising on state statutes, impairing contracts, taxing the U. States Bank, &c. in which cases it decided state statutes, acts, and laws were unconstitutional; in which many of the Presidents, members of Congress, state governors, legislators and judges, had acted on the principle they were constitutional, and so found themselves opposed to this Court; and though, often, their feelings, and sometimes their pride was excited, yet in no one case, was there ever a majority of state legislators or state judges, ascertained to be against it. It has not so often decided statutes unconstitutional as the state judges have. All its decisions remain in force, not reversed by itself, and on the whole, it stands firm.—1st. Because the constitution supports it; so have, and do, most of the eminent, experienced lawyers, who know the value of a firm, independent judiciary, State and Federal in popular Government, to stay the waves of popular feeling, till time produces reflection and moderation. If, when this is done, a majority of the people think its decision or decisions wrong, they will alter the constitution, as in 1793, impeach, as in 1795, 1805, 1830; or find some other remedy. Only three such cases have existed in 40 years; and because Judge Chase, impeached, was not condemned, Mr. Jefferson hastily formed an opinion that the remedy by impeachment was of no value. The excited citizens of the South, too, think amendments a slow process, and three fourths of the legislatures may not agree; with whom nothing is valuable that does not accord with "*feeling*," "*feelings of honorable justice*," in a hot climate.

2d. Presidents, members of Congress, State Governors, legislators, and judges, have ever been nearly equally divided on the great disputed questions. Creditors, public and private, men of property and experience, have generally supported it, and the debtors, embarrassed men, men of ardent dispositions, and having vague notions of law and liberty, have opposed it,

and the judicial powers generally. This, in all republics, has been the natural course. Sect. 44.

3d. Those who have supported the constitution as it is supreme law, and a rule of conduct, have had the advantage, and they, generally, have supported this court. Those, who have viewed the constitution as a *compact*, have laboured under some disadvantages, and they have been most opposed to this court. Their ideas of their compact have been various and fluctuating, and confused; hence, they have had no rallying point as the supporters have, and who have had by far the most able guides in an arduous, judicial controversy.

4th. It is not recollected that more than two or three state courts, have ever decided on the same point against the Supreme Court—to which the opposition has usually been made by annual state legislatures, ever differing among themselves, except in 1793, as to the 11th amendment. Such changeable bodies, so constituted, and little taught in nice law matters, but feebly oppose the learning, experience and stability of law courts; cautious in every step they take, and always hearing opposed counsel. Fluctuating forever the more stable legislature of Virginia has, in 31 years, directly opposed itself. In 1798, it decided 97 to 68, that the Supreme Court was not the common arbiter, in 1810 unanimously decided it was this arbiter. In 1829, it again decided it was not this arbiter, by only a majority not large. It is believed Virginia never has held that a state legislature is this arbiter. In fact the legislatures, the proper state *law makers*, have no guide or compass in judicial matters. Their leaders usually act like parties, not like judges. They usually hear no parties, nor their counsel; their course seems naturally to be, to argue for and against a law or measure proposed. Their practice is accordingly, and right enough. The silent members may judge fairly when they do not take sides in hearing and judging, as they always must in voting *pro* and *con*. As to the power of state legislatures to suspend acts of Congress, so to make them "depend upon the will of each and every state," Senator Johnson observes, p. 23. This power is not derived from the constitution, but is a high and transcendental power, above the constitution, and above all law; it is an abstraction from the idea of sovereign power, and a refinement on the theory of government. The people of the states have not delegated this *veto* to the legislatures; it is *judicial*, not a *legislative* power; if it pertains to the sovereign power of the state, it must be a reserved power to the people, to be exercised by them, in their sovereign capacity. But, whether the states, or the people of a state, have a right to negative the laws, is a question to be determined. By whom? By the State?—that is, to be judge in its own cause? Or is it to be submitted to a majority of the people of all the states? Or to the Supreme Court?—It is "a controversy in which the United States are a party"—So, by these words of the constitution, to be decided by this court—same p. 28. "Admitting the power of the state, and the right to decide for herself, then, each, and every state in the Union, has a constitutional *veto* on the laws of

Sect. 44. the United States," &c. What a scene of confusion. P. 24. Again, "each state then, and the smallest state, with the smallest majority, may suspend its laws within her jurisdiction, then the action of the government must depend on the concurrent will of each, and all the states." p. 24. If this be the right of a state, then this constitution "is a political monster, born incapable of living, and containing principles of self-destruction." The Union must dissolve peaceably, whenever the caprice, the passion, or ambition of a few aspiring men of a state will it, or it must be maintained by force. In pp. 24—25, he condemns Grundy's state convention. If there must be a convention of all the states, it ought to be called by the "complaining party, the resisting state." p. 25. So Massachusetts did in 1793—p. 26. On various motions in the convention, "upon more mature consideration, however, it was determined to extend the jurisdiction of the Supreme Court to all cases that could arise under the constitution, or the laws, or treaties. It was essential to make the judiciary power, coextensive with the legislative power"—cites the eleven cases to which it extends by the third article of the constitution, p. 31. "The right of a state to annul a law of Congress must depend on their showing that this is a mere confederation of states"—"this is not a compact of the States." Cites the Federalist.

Webster's 2d, speech p. 60. "The great question is, whose *prerogative is it to decide on the constitutionality* or unconstitutionality of the laws.—p. 61. "The right of a state to annul a law of Congress, cannot be maintained, but on the ground of the unalienable right of men to resist oppression, that is to say on the ground of revolution." A remedy above the constitution. "There is no mode in which a state government *under the constitution*, as a member of the Union, can interfere and stop the progress of the general government, by force of her own laws, under any circumstances whatever"—which makes it a creature of each state as well as of all the states—the servant of twenty-four masters, of different wills and different purposes, yet bound to obey all"—and each one. The general government "is the people's government"—their constitution made by them, and the supreme law." p. 76. "The people have wisely provided in the constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law." The constitution has ordained the authority by declaring, "*the Constitution, and laws of the United States, made in pursuance thereof, shall be the supreme law of the land, any thing in the constitution or laws of any state to the contrary, notwithstanding.*" p. 77. The constitution has declared the Supreme Court shall decide questions of constitutional law, by declaring "*that the judicial power shall extend to all cases, arising under* the constitution and laws of the United States." "These two provisions cover the whole ground."

It is said, the federal judges are appointed by the President, and paid by Congress, so on one side in state controversies with the general government. But the President is the President of

all, and the Federal Senate is an equal and independent branch, in the Federal legislature, and can prevent any and every act, being enacted. This Senate is the very creature of the state Legislatures, and the most complaining, always elected by them. If there be any objection, it is, that experience and motives often prove these senators, are better agents of their respective state governments, than they are of the general government. When we see what efforts, for forty years, many federal senators have made, to support and increase state rights, we are often left to infer, they know no other; and that they think twenty-four state governors, 3,000 state legislators, and above a hundred supreme, state Judges, have no ability to understand and protect their own state rights. Some hundred of state judges are paid by the states. SECT. 45.

5th. Those who deny the Supreme Court is the common arbiter, differ essentially among themselves, even in the federal senate, as on Mr. Foot's resolution, senator Hayne supported the S. Carolina doctrine, above stated—Mr. Grundy ceded it is the common umpire to decide on the constitutionality of all congressional enactments made *in pursuance* of the constitution. "He admitted the legislature of a state was not the tribunal" to decide, but a *state convention* may be called, and that may nullify the oppressive law, after which Congress must acquiesce, by abandoning the power. Mr. Woodbury rather rested on a convention of the states on the 5th article of the constitution, and the right to stand on the unalienable right to resist extreme oppression. Senator Rowan's opinion has been noticed, as above. These are but a few of the different opinions among the advocates of state rights, and, till they better agree, that court will stand firm, and keep its steady course undisturbed. The objection, that the federal judges are appointed by the President, and paid by Congress, leads us to notice their appointments and pay are assented to by the senators in Congress, the very agents of the several states, invariably elected by their state legislatures, and instructed by them whenever they see fit to do so.

We find valuable matter in the proceedings of Virginia, Massachusetts, &c. in 1798, and 1799, as to the important questions, who is to construe the constitution of the United States in the last resort, and is it a compact or not? On the subject of the Virginia resolves as to the alien and sedition acts of Congress, the minority in the Virginia legislature, 68 (majority, 97) addressed the people, and, in their address, ably supported the doctrines of those, who hold the constitution is not a compact, and that the Supreme Court is the common arbiter. They said the constitution of the United States "presents to us, for many purposes, an *entire nation*"—So says even Jefferson. They enumerated the objects of the general government, and added, "with regard to these objects, America is one nation, and, therefore, the state governments are restrained from interfering with these great objects of sovereignty,"—as to foreign enemies, "the means of obtaining intelligence of their plots, are in possession of the general government." "In the confederation all powers,

Sect. 45. not *expressly* delegated, are retained, but in the amendment, (of the constitution,) this expressive word is omitted"—that *is*, the word expressly is omitted. The address goes on, "the legislature of Virginia, has, itself, passed more than one unconstitutional law, but they have not been passed with an intention to violate the constitution. On being decided to be unconstitutional by the legitimate authority, they have been permitted to fall." Had the judges deemed them constitutional, they would have been maintained. The same check, nor is it a less efficient one, exists in the government of the Union. The judges of the United States are as independent as the judges of the state of Virginia; nor is there any reason to believe them less wise and less virtuous. "*It is their province and their duty, to construe the constitution and laws;* and it cannot be doubted but that they will perform this duty faithfully and truly." "Let us, in the mean time, seek a repeal of every act we disapprove." We have seen how the parties, stood in Virginia, 68 minority, 97 majority. In Massachusetts legislature, on the same subject, the Virginia minority was supported by every senator except one, and in the House, by a vote of 116 to 29. Taking both sides together, there was a very great majority that supported the Supreme Court as the *common arbiter*, and the constitution, in the main, as anti compact—nearly, in every state in the Union, the state judges, as in Virginia, on the constitutionality of state laws. So, on the whole, the Supreme Court has been supported as the common arbiter, even in Virginia; taking together the votes in her legislature in 1798—1810—and 1829. In this address is taught another true principle, that is, the people of the United States, in fact, of the twenty-four states, and territories, are one entire nation to all national or general purposes. It is a settled principle, if two powers in the same system, clash, and one must yield, the less must yield to the greater. This has been the practice, as to both original and delegated sovereignty. Therefore, when the people of Massachusetts formed and established their state constitution, though, in so doing, they acted in their original, sovereign capacity; yet they confessedly acted in subordination, as a part of the American people, as to the powers vested in the general government by the whole people, or to be so vested.

Sect. 45. Can a legislature, take from a judge during good behavior his office? So his salary of course.

Long has existed a third great question, can a legislature, State or Federal, take from a judge, *during good behavior*, his office? of course, his salary. On the decision of this question in February 1802, were the federal circuit judges removed, by Congress' repealing the act under which they were appointed in 1801—this, by abolishing their offices. It is true they were inferior judges, so their offices were established by act of Congress, and not by the constitution, as the offices of the Supreme Judges are. All agreed their salaries ceased with their offices. This was an important democratic decision, extending the powers of Congress and the President against the Judiciary. We find, in the two important speeches, in the House, of Mr. Giles and Mr. Bayard, important principles. These speeches were preserved

as containing the main arguments on both sides. We find in this case, as in others, for forty years, the majority in Congress, federal or democratic, has given the constitution a broad construction, and the *minority*, a limited one—proving what is universally proved, that is, that men naturally extend powers in their own hands, and limit them when their opponents possess them. During the twelve years from March 4th 1789 to March 4th, 1801, the federal party were the majority, generally, in Congress. Their object, evidently, was to extend the federal powers, they possessed, more especially the *judicial* and *executive* powers—little foreseeing these powers were soon to pass into democratic hands, to be, by them, in fact, continued; but yet in a manner to put down, and keep down, all federalists, except some, whose political coats were as good one side as the other. SECT. 46.

Of all the majorities in Congress the democratic have most extended federal, legislative powers. Witness the abolition of the circuit courts in 1802—the long embargo, and acts to enforce it—internal improvements and tariffs, armies and navies, and an United States Bank, all much increased—foreign missions multiplied, public expenses increased, and federal credit and finances essentially preserved. The executive power, also, has been increased. The long and ruinous embargo was an executive measure; and the President's power to remove from office without giving any reasons, has been vastly increased in practice, under democratic indulgencies and defence; a power, in its nature, corrupting and dangerous, as it makes thousands of openings to put favourites into office, and encourage office seekers. SECT. 46. How democracy has increased legislative and executive power, and opposed the judicial.

The federalists, with the aid of Washington and Adams, governed twelve years, by small majorities generally. In the case of the British treaty they had but three plurality in the house, 51 to 48 votes. In 1799, Washington died, the federalists divided as to French affairs, and in 1801, Jefferson was elected President, by a small majority. He, and the democratic party, became the majority, and federalists in their measures, generally, except as to the judiciary; though for twenty-nine years as before, they had acted and talked like democrats. And the old federalists have, in most cases, for the same twenty-nine years, opposed constructive powers as before their opponents did. As to the judiciary, both parties have continued to act on their former principles. The hostility of Jefferson and his party to this Judiciary, cannot have been mainly personal or political, as all the judges of the Supreme Court for eighteen years, except Marshall and Washington, have been appointed by democratic Presidents. This hostility is found in the nature of civil society and government—that is, in the debtor's interest, and in loose inaccurate thinking, generally. The debtor, the tender and stop law, and bad paper money interests, ever have been, are, and will be, with a few exceptions, hostile, in grain, and feelings, to judicial power, correctly administered.

In the Circuit Court debate. Feb. 1802, Mr. Giles, supported SECT. 47.

&c. "The judicial power shall be vested, &c. art. 1st, sect. 8th, No. 9. We now find, in the legislative department, the same *imperative* language of the people used—all legislative power herein granted *shall* be vested in a Congress; not *is* vested to consist, &c. It may be said with equal propriety, Congress, or the legislative department, is not formed by the constitution, if it rests on the word *shall*. The constitution only says, Congress *shall* consist of a Senate, a House of Representatives, and then directs how the state legislatures and the people shall form them, observing certain rules—and, if the state legislature, and the people, had neglected to form them, none ever could have existed. We find the very same language applied to the executive department, to wit, the executive power *shall* be vested in a President, &c. he shall hold his office, &c. Here the executive department is not formed by the constitution. It only directs how it shall be formed by Congress, state legislatures, and the people, and had these neglected to form the executive department, none could ever have existed—proving none was formed by the constitution. In all these cases, the language is imperative, and the same, and not to obey is a breach of duty. Nor is it true, that "the assignment of the duties of judges," is left to the entire discretion of Congress. On the contrary, the constitution itself, describes and defines the powers of the Supreme Court, and vests them in it, as before stated. SECT. 48.

As to the President's appointing and commissioning the judges, stated by Giles, to prove their dependence, Mr. Bayard and others answered, "a law has created the office—the judge has been appointed, and the office filled, the law therefore is executed and cannot be repealed." In defence of the judiciary, it was said, "all agree the legislature has not the power to remove the judge from his office"—"but it is contended only that the office may be taken from the judge." "Is it not the same to take the office, and to remove the judge from the office."—"The judge is to hold the office during good behaviour, does he hold it when it is taken from him?" Has the constitution said he shall hold his office during good behaviour, unless Congress shall deem it expedient to abolish that office?" "As the limitation is omitted, what right have we to make it a part of the constitution? You cannot remove the judge from the office, but you may take the office from the judge." "You cannot take the compensation from the judge, but you may remove the judge from the compensation." Bayard.

Sec. 48. How the Supreme Court must decide. Debate. 1802.

It was well observed, somebody must decide if acts of Congress be constitutional or not; it is clearly not the President. Shall the legislature judge of its own acts. If so, they said, "it may then enact the most despotic act and decide it is constitutional." They asked, "has the legislature of a state a right to declare an act of Congress is void." This, they said, "would be erring in the other extreme. It would be placing the General Government at the feet of a State Government." "It would, be allowing one member of the Union to control all the

Sect. 49. rest, inevitably lead to civil dissension, and to a dissolution of the General Government." Will it be pretended the state courts have the exclusive right of deciding on the validity of our laws? If the courts cannot decide on the invalidity of the law, there is no defence.—One case, Congress is forbidden to pass a bill of attainder, but Congress passes one, and the President signs it—the party attainted, is seized, and brought before a federal court, and an award of execution is passed against him; he produces the constitution, and pleads the clause that declares no bill of attainder shall be passed; the attorney for the United States reads the bill of attainder—the court is bound to decide a question the parties make rightfully and properly.—The court has no alternative, it must decide the law or the constitution *is* invalid. The court must, of necessity hold that one or the other is void. If it has no power to declare the statute void, it holds the constitution invalid; but, they added, the constitution is absolutely supreme law, not so the act of Congress, such only are the laws of the land, made in pursuance of the constitution." Many such cases have existed in state and federal courts, in which one party of right pleads a constitution as his defence, and to support his cause, the other party pleads a statute inconsistent with the constitution, as his support, and, rightfully, according to the laws of pleading. The court is called on, and, in duty bound, must decide for one party or the other. It has no choice. The cause in the course of law is brought before it; the parties plead and raise the question, to be decided as the law allows. How absurd is it to think such questions are not judicial questions in their nature. No notions about state sovereignty can correctly bring them before a legislature, state or federal. Congress, in September, 1789, when it enacted the judicial act, viewed these principles; for in the 26th sect. of that act, it expressly recognised the right of a state court to declare a statute, and an authority exercised under the United States void, subject to the revision of the Supreme Court, and all parties have 40 years acquiesced in, and practised on this section, and admitted there is such a right and power in the state and federal courts. This section clearly involves sovereignty and place it in courts.

There have been hundreds of cases in which state courts have held state statutes unconstitutional, and void. Such cases have existed, and have been so decided, in every State. So things ought to be. Such decisions must be unavoidably made by some men, or tribunal, or justice must fail.

Sect 49. The Supreme and other federal courts have *all* judicial power in federal cases.

It has been objected that the Federal Judiciary extends only to laws *made in pursuance of the constitution.* The words, *made in pursuance,* are found only in art. 3d, sect. 2d, and only respect *supreme law*—not the judicial power vested in the Federal Judiciary *in all cases,* as follows—art. 3d, sect. 1st. "The judicial power of the United States, shall be vested in one Supreme Court, and such inferior courts," &c. Here the *judicial power* clearly means *all* the judicial power granted to the General Government, leaving no *judicial* power in Congress or the

executive. 2dly. art. 3d, sect. 2d. "The judicial power shall extend to all cases, in law and equity, arising under this constitution; the laws of the United States, and treaties made "by them"—that is, to all cases *arising* under the laws enacted in due form, and *de facto*, constitutional or not. 3d. All acts of Congress, so enacted, are laws of the U. States until properly adjudged not to be law, but void. So has been the practice 40 years. Instance the said pension law, adjudged to be unconstitutional, yet all admitted the judicial power extended to the pension case, as a case arising under a law of the United States, though not constitutional. Another case is, that of the United States Bank. This case did arise under an act of Congress, one party said it was unconstitutional and void; but very properly admitted the Federal Judiciary to sustain the case, as a case arising under a law of the United States, and it had been properly sustained as was the pension case, though the bank act had been unconstitutional. These and other cases, common sense and sound law, prove the 40 years practice has been right. 4th. A law of Congress means an act of Congress, and though it be unconstitutional, still it is an act or law of Congress, and a federal, judicial case may arise under it. SECT. 50.

5th. The judicial power extends to all cases affecting ambassadors, ministers, and consuls. 6th.—To cases of admiralty and maritime jurisdiction. 7th.—To controversies in which the United States are a party. 8th.—To cases between two or more states. 9th.—To cases between a state and citizens of another state. 10th.—To cases between citizens of a state claiming lands under the grants of different states. 11th.—To cases between a state or citizen and foreign states, citizens or subjects.

Sect. 50. A state can surrender a portion of her sovereignty.

We find, of late, a new notion—that is, that a state cannot surrender any portion of her sovereignty. If here, "*surrender*," means any thing, it means part with, grant, or transfer any portion. What do Mr. Rowan and others, here mean by the word *state*. It has, in our constitution as many as five different meanings. If the Senators mean by the word *state*, *people*, they can, and must surrender, part with, grant, or transfer a portion of their sovereignty; or, clearly, neither the General, nor a State Government, can have any sovereignty, for neither is self existent. If it have any sovereign power, it is delegated to it by the people—then they part with the portion they grant. If by the word *State*, is intended the State *Government* we have answers; The State Governments made and constituted the Old Confederation, and did, in fact, surrender, grant and transfer a portion of their sovereignty to the Union. 2d. As the constitution of the United States is not derived from the State Governments, but from the people themselves, "We, the people of the United States"—they surely could, and did, vest a portion of sovereignty in their General Government, both by means of the constitution, and as they had granted to the State Governments all the sovereign power they possessed in 1787, with the reservation ever made by the people, to alter, take back, or transfer to

no power to establish such a mint and state laws; this is necessarily taking cognizance, even of the original sovereignty of the people of a state, and deciding thereon. I say, necessarily, for it is extremely clear the judge, supreme, superior, or inferior, is obliged to decide on the whole view of the law constitutional, statute, or other, applying to the case before him, whenever required by the pleadings, in legal form to decide. It, therefore, shows gross ignorance, to think sovereignty, especially state sovereignty, so misnamed, is above *judicial* cognizance. Surely, if such state were as sovereign as Russia, it would be able to establish a mint, legally and constitutionally, and coin money of any sort, and make it a legal tender. SECT. 52.

SECT. 52. Delegated Sovereignty entire or divided.

The next kind of sovereignty is that which is delegated by the people, to their legislative, executive, and judicial agents. This, in Russia, is entire, and vested in one man, the emperor.

In the United States it is divided and subdivided into a hundred portions, or more. A very large portion of it is granted to, and vested in, the general government. This is subdivided into five portions, the legislative, executive, and judicial, and the legislative is further subdivided between the Senate and House. Another portion is granted to, and vested in twenty-four state governments, and the small portion in each is subdivided into five, still smaller portions, as in the general government. Each of these numerous portions is so vested as to be independent of the other for all the purposes of its investment. For instance, the portion granted to, and vested in the Senate of Delaware, by the people thereof, by them only can it be taken from that Senate, or varied, not by the House, the Executive, or Judiciary. The same may be said of every portion or constitutional feature in our complex system. Hence, it may be seen, at once, that scarcely a hundredth part of this delegated sovereignty is vested in any one state legislature; and this little only *delegated*, not a particle of *original* sovereignty. Yet according to some chaotic notion, this small portion is too high to be recognized and decided on by the Judiciary, but only by its legislative self. The people themselves, in their natural, inherent sovereignty, but rarely interpose and decide,—never but in making or altering a constitution.

SECT. 52. Judiciary recognized state sovereignty under the Confederation.

Though the individual states were more independent and sovereign under the confederation, than they are under the constitution, yet we do not find that state sovereignty was ever deemed too high for judicial cognizance. On the contrary, it was the common practice for the judiciary. federal and state, to take cognizance of it, and decide upon it—that is, to decide laws enacted by, and under state power or sovereignty, were constitutional or not. Such (among others) were the numerous judicial decisions made on state statutes, enacted in violation, in fact, or alledged, of the treaty of peace of 1783. Nor do we find state sovereignty so above judicial cognizance for many years after the constitution was adopted. Indeed, formerly, the right of a state legislature to nullify an act of Congress was mentioned only as a political heresy. It seems that only the warm imaginations

Sect. 54. of the South, are capable of conceiving such right to be orthodox. Be this as it may, the tariff of 1828 has already produced several different state opinions, or decisions, in State Legislatures—six that it is constitutional, as of Vermont, Pennsylvania, Delaware, Kentucky, Ohio, and Louisiana—three, that is not constitutional, as of Virginia, South Carolina, and Georgia—and were all to give opinions, probably, the six would increase to thirteen, and the three to eleven.

Sect. 54. Varying notions of party men.

The varying notions of party men. If we would know how one of them construes the constitution and laws, we must inquire whether he is in the majority or minority. Men, naturally, enlarge powers, when in their own hands, or the hands of their friends, and limit them when in the hands of their adversaries, in the same degree. Majorities possess and exercise them. Their passions, feelings, and self confidence, ever influence them to extend them, and to make them bear hard on opposed minorities, whose passions and feelings are, by nature, against such extension. We may cite thousands of cases to prove the facts. A few must suffice. When a respectable member of Congress (Mr. B.) was in the federal majority, he thought the citizens right and power to sue a state, was the fairest feature in the Federal Constitution, and that its specified powers must yield, so as to effect the common defence, and general welfare. When in the minority, his object was to confine its powers to the plain meaning, and to limit them to the very letter of the specified powers. Instance of a state legislature. In 1798, that of Virginia was in the minority in the General Government, then it thought Congress had no power to enact the alien and sedition acts, and that the Supreme Court was not the common arbiter; and it strove hard to limit federal powers. In 1810, Virginia was in the majority in the General Government, then her legislature unanimously held, that Court was the common arbiter, as above, and then supported the very extended powers of the General Government, exercised in creating and upholding the long embargo, and restrictive system; and more especially the despotic acts of Congress, enacted to enforce those measures. In 1829, Virginia, on the great subjects of the times, as tariffs, and internal improvements, was in the minority, and her legislature returned to its ground of 1798, denied the Supreme Court was the common arbiter, and limited the powers of the Union as much as possible. These facts cannot be disputed.

Take the majorities in the three cases. The Virginia Legislature has made that Court the common arbiter, and once or twice, not such arbiter. Such changes have not been peculiar to Mr. B. and Virginia, but a majority of prominent party men, and of States, have conducted in a similar manner, during 54 years, though the evidence of their changes may not be so well preserved on record. From all this we may infer, that the numerous speeches made in so long a time, to extend or limit constitutional powers and rights, state and federal, have not all grown out of the constitution, so much as they have out of party feeling and passion, self-love and self-confidence. There-

fore, we find the same men, parties and states, have been, at different times, and on different occasions, directly opposed to themselves. When some States supported the alien and sedition acts, their speeches and writings were framed to extend federal powers.—When the same were opposed to embargoes, restrictions, and the war, all were framed to limit those powers. All these things prove the necessity there is of a common arbiter, to sit and hear parties, not to think and act like them; as exempt as possible from party spirit, party passions and feelings, to decide the numerous contests that daily arise among a free and active people, ever contending for their respective rights. In 1810, the Virginia Legislature, *unanimously*, proclaimed very just and valuable opinions, declaring this Supreme Court was the common arbiter, and therein agreed, eight States, to wit, North Carolina, Maryland, Georgia, Tennessee, Kentucky, New Jersey, Vermont, and New Hampshire. No State appeared to dissent. (Johnson, p. 38—and doings of Virginia, 38, 39.) The more we examine these subjects, the more we are induced to hold that the State Legislatures are the most unfit to be the common arbiter, to judge and decide controversies, not only because, on sound American principles, they are only *law makers*, in number above twenty, and composed of numerous members, but because they are a *party* organized, not to hear parties, and stand between them to judge and decide uprightly, but to argue pro and con, and to be influenced to decide by argument and eloquence, rather than by evidence and truth, dispassionately, coolly, and impartially weighed. In contests with the General Government, it is the duty of State Legislatures *to claim* rights rather than to sit in judgment, and decide, finally, on the rights they claim as theirs. Experience proves members of Congress and of State Legislatures, in general, argue *pro* and *con*, like parties, and not sit, hear, and decide, like judges. To think and decide what the law *ought to be*, is their proper business, and not *what it is*.

SECT. 55.

SECT. 55. Resulted the necessity of a *judicial* common arbiter.

The supporters of the general government hold the people made it, and have trusted it with the construction of its own powers. To this, the supporters of the State governments object, and say, this subverts state sovereignty, whether the right to judge be in Congress or the Supreme Court. To this, it is answered,—" The people have chosen to trust themselves, first, to the plain words of the instrument (the Constitution) and such construction as the government itself in doubtful cases, should put on its own powers, under their oaths of office, and subject to their responsibility to them; just as the people of a State, trust their own State Governments with a similar power. Secondly, they have reposed their trust in the efficacy of frequent elections, and in their own power to remove their own servants and agents, whenever they see fit cause. Thirdly, they have reposed trust in the judicial power, which, in order it may be trust-worthy, they have made as respectable, as disinterested, and as independent as practicable. Fourthly, they have seen fit to rely, in case of necessity, or high expediency, on their known and admitted

SECT. 56. The State Governments are essential parts of our system and must be supported.

Sect. 57. power, to alter or amend the constitution, peaceably and quietly, whenever experience shall point out defects or imperfections. And, finally, the people of the United States, have, at no time, in no way, directly or indirectly, authorized any state legislature to construe or interpret *their* high instrument of government, much less to interfere, by their own power, to arrest its course and operations." [Webster's 2d speech. pp. 52. 53.]

Sect. 57. How a nation as sovereign as Russia is may join in a Congress in appointing a common arbiter and be bound.

It is impossible to see how the legislature of a single state can have power, finally and alone, to construe an act of Congress, and at pleasure, to annul it. The people of one state, surely cannot have power to authorise their legislature to annul an act of Congress, the act of all the people of twenty-four states. Admit, for argument sake, the people of South Carolina are as *sovereign* as the people of Russia. Surely if the people of Russia, by their agents, meet in a Congress of all the States of Europe, empowered to ordain and establish neutral rights, and that Congress do so, and it is a question, if it has exceeded its power, and the parties, also, constitute a tribunal, and vest in it the judicial power to construe the acts of Congress on the subject of neutral right, even before that tribunal decide the question, how are the people of Russia, even by their despotic emperor, to take the question from that tribunal, decide it, and free themselves? Would not the other states say to Russia, you consented to be a party in the Congress, and joined in establishing the tribunal, with power to interpret, finally, the acts of Congress relating to neutral rights. Russia says, I am a sovereign nation, and my sublime sovereignty is above *judicial* cognizance. Would not the other say, you should have thought of that before you joined in the Congress, and in constituting that tribunal. Is it not in the very nature of sovereignty and of government, for sovereignty to come in question in the judicial courts of a nation? Suppose the people of South Carolina had this power so to authorise their legislature, when did they do it? Never. We look *into* their constitution, we find no such authority, expressed or implied.

South Carolina.

Sect. 58. State Governments have the best means of self defence and protection. Reasons.

In the next place, the State Governments have more power and means granted to them to defend themselves, and retain their power, than the General Government has. That has no agents in the Legislatures, Executives, or Judicicaries of the State, to watch and defend it, and to prevent measures encroaching on it. Directly otherwise is the case of the State Governments. First, they have, at all times, their senators in Congress, all elected, and often instructed by State Legislatures. No law can be passed by Congress, and scarcely any appointments to office, be made, without their consent. These senators, are, or ought to be, security enough to preserve State Governments in their proper places. Secondly, when the occasion requires it, the State governments can bring into action twenty-four state governors, numerous counsellors, 3,000 and more state representatives, 100 and more, supreme state judges, and half a million more of state officers, omitting a host of quite inferior offices. They have on their side, nearly all the banks and monied cor-

porations—the largest influence of the militia and clergy. Thirdly, to the purposes of amendments, State Legislatures can express opinions on the acts of the General Government, as they have done, frequently. The General Government has no such right, nor ever has exercised any such. If Carolina should restore Locke's feudal system, the General Government would have no constitutional right to express an opinion on the subject. Federal officers, as individuals, might say it is a bad thing, so might our wives and children. SECT. 59.

Fourthly, the States can exist in their present form though the General Government cease to exist—not, that, if they cease to exist. Another way to preserve the State Governments is, for governors and other principal state officers to respect their own dignity, and watch the General Government—not give opinions on small occasions, especially, not to give erroneous ones—Look well to the first Cromwell, and to the first usurping faction, monarchical, aristocratic, or democratic—Act cautiously but firmly. One way to degrade the State Governments is, for their principal rulers to forget their own dignity and duties, and to become caucus men in federal elections, so divided into electioneering parties; and destroy their influence entirely, by giving opinions on the same point or measure, directly opposed, some to others, as is too usual. As to federal, judicial usurpation, if it shall ever exist, it may be best to leave it to the State Judiciaries, which will best understand it, and more steadily and permanently resist it, than annual legislators. So these State Judiciaries have the very books federal judges build on, and can ably use these very books against them. All men love to retain power, and such as the federal judges, usurp and gain, generally, state judges know they must lose.

SECT. 59. Conclusion. Summary view—Embargo times: Nullification impracticable. Secession illegal and must end in war.

Finally, among all the wonders of our wonderful age, one of the greatest must be the assumption of one of twenty-four State Legislatures, united under a constitution, not in a seventh part *compact*; claiming the rights of its State, so itself the party claimant, at any rate the claimant's agent; then assuming, it has, at its pleasure, a *constitutional* power, *peaceably*, and *finally*, to construe the constitution, ordained and established by the people of all the states—then, in substance, to annul the laws enacted, by all; in the enactment of which this very legislature was a party, by senators of its own choice, liable, as is the practice, to its instructions—laws confirmed by a President in the election of whom this legislature took a part, and in whose election its constituents immediately joined, which constituents also joined in establishing the Supreme Court, the common arbiter, without which common sense sees that the Constitution can be of no value, perhaps an evil, as it affords so many matters of perpetual controversy, strife, and civil war, if there be no common arbiter to decide disputes—all this after this Court has acted the part of the common arbiter, 40 years, without objection, except by disappointed and dissatisfied *minorities*; not even by Virginia, when in the majority. All this, on the groundless assertions, that the constitution of the United States is a *federative compact*

Sect. 59. among States, and the state parties to it, as distinct nations, are parties to a treaty, having no common arbiter. It certainly would be useless to oppose notions so absurd, were they not often the avowed notions of respectable, but disappointed minorities, especially, South of the Potomac. Though each State is so completely linked in, and bound, and has retained but a share of even internal power, as the authorities cited in these pages, and other records shew, yet a senator in Congress is found to assert, that any one of them is as sovereign as Russia.

Finally, it may be confidently asserted that, on trial, it will be found. 1st. Totally impracticable for a state, *peaceably*, to nullify or to suspend an act of Congress, within itself, while it remains a member of the Union.—2d. Impracticable for it to cease to be a member and separate, but on *revolutionary* principles, and by exerting superior force.—3d. If there shall ever be a separation it will be a separation of a sufficient number of contiguous States to form a new and respectable Government—anticipating wars and feeling sufficient strength to defend themselves.—4th. If such a number shall unite for the purpose of separation and the other states shall at first be inactive, or partially acquiesce; soon *the immense property of the United States* will be a bone of contention and with other causes, will in time bring on hot contention and war, or prove a separation far worse than compromise. Let time test these positions.

As to the first, *nullification*, a new name, but an old subject. The long and ruinous embargo and restrictive system, for years, in the East, taxed ingenuity to the uttermost to discover ways and means to terminate those evils, and to defeat the vicious operation of the embargo and restraining acts of Congress, which, in some years, lowered the value of estates in many seaports from two to three hundred per cent. For years there was much excitement, inflammatory pieces were published, loud threats were uttered; legislatures roared; excited men met in various conventions, made and heard warm and bold speeches; proposed various remedies; one to find the unconstitutionality of those acts in the Judiciary; another to resort to suspending or nullifying state legislation—many were confident the Judiciary would decide the embargo acts were unconstitutional and void—on trial they were disappointed—some few men most excited proposed state legislation, an act for seizing the navy yard and other property of the United States; moderate men, looking to the laws and consequences asked how could this be done, whilst the state kept its seat in Congress, and professed to be a member of the Union, and governed on its true principles; observing such a seizure could be only on the ground of separation and revolutionary principles above law and constitutions; as the most excited did not wish for separation, that scheme existed its hour and was heard of no more.—It is believed the highest measure proposed was state laws, to be enacted so far to make void the revenue acts of Congress as to turn the impost duties and other federal taxes, collected in the state, into its treasury, to apply them to defence and count

for them in future—A little reflection convinced them not only the illegality of this project, but its futility for various obvious reasons—this scheme was dropt almost as soon as named.—Numerous other plans were proposed, each one of which was found, on examination, to make bad worse if adopted.—On the whole, on years oppressions severely felt, and remedies proposed, no one could be found that would not in all probability, increase the existing evils—and it is well that moderate men in the end prevailed. Men very firmly attached to the Union and very readily paid their war taxes.—In reality the dissatisfied states and the General Government in substance if not in words, made satisfactory arrangement as the public records, fairly examined, will prove. Sect. 60.

2d. As to separation—it was not thought of enough to lead to any serious proposals—In caucus heat, one or two might mention it, though the writers has not the least knowledge any one ever did; hence he can add nothing on the subject of separation. In the 15th section are stated the very complicated allegiances in the United States.—Clear it is, that whilst these can be pleaded in the Judiciaries, there can be no separation; another proof, one can be only on revolutionary principles, that disregards all allegiance which was the case in our revolution, whenever it required the laws of peace to be silent, as mild as it was.

3d. Men of the north, most excited, thought they must carefully read the constitutions and laws, and be governed by their true meaning. It seems, they had not learnt the new ground of state action, "the feelings of honorable justice," well worked up by good dinners, good wine and good speeches—Men of the north put down *separation* as the scheme of South Carolina only.

Whatever South Carolina may think, she is driving to *separation* to *secession*—this some of her own citizens see, and pronounce her *peaceable nullification* of Congressional acts, a delusion. It is surprising to observe how inattentive her principal speakers and writers are to consequences—they seem to be a few ambitious men, willing to keep or receive offices.—They tell us of their high minded patriotism! As lofty as it is, we find it limited entirely to nine two hundred and sixteenth parts of the nation, exactly to their election limits.—One of her most moderate sons, (Col. Drayton,) July, 1830, says—"In the ordinary administration of affairs the assertion of a right of a majority to bind the people is a mere truism, and he added "the right of a state to secede from the Union I unqualifiedly concede."—If this be true, on what ground does South Carolina condemn the Eastern States, even if they meant secession, the seven years they were oppressed—their movements in the time of the war, made no difference, because the war itself, and alone, caused those movements.—But the Eastern states did not mean secession; but, totally, denied the right of a state to secede.—As to a majority in Congress, binding the people "in the ordinary administration of affairs," it may be observed they submitted to be bound,—except first when they alter the constitution, a legal course. 2d. When they see fit to make a *revolution*; but who

Sect. 60. Lately a new ground taken by S. Carolina.

Sect. 60. decide and make it? Any twenty fifth part of the nation whenever that part pleases? Secession, not assented to, draws the sword.—A state's right to secede is new as is South Carolina's nullification.—Neither has ever been admitted or claimed north of South Carolina. Col. Drayton says a majority may be *a faction* as well as a minority.—Does he reflect that in a nation of vast extent, and of various sectional interests, the laws of *honest* majorities may often bear hard on minorities; and that each minority may, and probably will, have its turn?—the East had its turn seven years and found relief but in Union, as above stated. The East thought the majorities that voted the embargo in an error, but not *factions*;—Those majorities were *mainly*, land and slave holders, South Carolina included. Will she say, they were factions. Clearly as much factions, as tariff, road and canal majorities are.—In neither case, were or are the majorities factions;—but *larger sectional* interests in both cases, acting on the principles of human nature, and bearing hard on minorities, in which men best learn wisdom, if they only have some reflecting men to control mad ones.

When the constitution was formed, the great sectional interests were those of Eastern commerce and fisheries; of the public creditors, mostly east of the Potomac, and of southern planters, men rich in land and slaves; not in money, or as creditors; hence, naturally, opposed to taxes and plans that require money; sometimes a useful check to prevent a waste of it—Since a great manufacturing interest has grown up in the Eastern, middle and western States—and a great road and canal interest in the Western and other States.—Some early foresaw some great sectional interest, might by Union or otherwise, oppress the smaller; hence specially to be guarded against.—From early times, two ways *have been* adopted (besides our usual checks) to prevent hasty enactments of law, improper treaties; too many impeachments and amendments; one way requires a vote of two thirds; the other the veto of the first magistrate—two thirds in great cases in the confederation; so in the constitution to amend it; to ratify treaties and to convict on impeachments—the *veto* in all legislation.—Like caution of two thirds has been often recommended—by Virginia, &c. to regulate commerce and pass navigation acts—by several amendment writers in other cases—by Eastern States in January, 1815, to interdict commerce with other nations; to declare offensive war, and to admit new States.—The first sectional oppression severely felt, was of Eastern commerce and fisheries—reducing the value of real estates, in many seaports, from two to three hundred per cent.—The *veto* is a common American principle and in the hands of a firm and judicious first magistrate, state or federal, may be often used to good purpose, to restrain majorities less than two thirds going too far.—The other way requiring two thirds in certain cases affecting vital interests, especially, geographical and sectional, I do not think has been carried far enough.

If a State has a constitutional right to secede as asserted by

Col. Drayton and Col. Hamilton,—seceding it becomes entirely separate, a new nation free to act as it pleases.—On this ground a State in time of war can rightfully secede, and of course make a separate peace or join the enemy.—Surely such was not the opinion, when some absurdly thought Eastern States meant to secede. SECT. 60.

If South Carolina severs herself from the Union, by her own act, what will she do with the public debt and her federal creditors? Clearly she can take with her no part of the United States property or treaties?—The treaties, navy, and navy yards, public lands and buildings, posts of fortifications, &c. &c. must remain to the Union.—In fine, near all the threatened evils of secession arise from denying that the Judiciary is the common tribunal to decide if acts of Congress are constitutional or not—the Eastern States admitting it to be such a tribunal tended greatly to prevent extreme measures when they were suffering under the embargo, &c.

NOTES.

NOTE A.

As after the lapse of 43 years, some for the first time, claim the ordinance of July 13, 1787, as a Virginia production; in substance Mr. Jefferson's, it is material to compare it with his plan or resolve (not ordinance) of April, 1784, in order to show how very groundless the assertion of Senator B. is, that the ordinance of '87 was "chiefly copied" from his plan.—To those who make the comparison, not a word need be said to refute his assertion—On the face of them the difference is so visible and essential—But thousands read his speeches, extensively published, where one makes this comparison. It is surprising, at this late day, that this claim is made for Virginia, never made by herself.

As but few possess the Journals of the Old Congress, in which Mr. Jefferson's plan of '84 and the ordinance of '87, formed by the author, are recorded, it is proper here, concisely to point out the material difference between them.—1st. The plan of '84 is contained in two pages and a half; the ordinance of '87 in eight pages.—2d. The first page in the plan, or resolve, of '84, is entirely omitted in the ordinance of '87.

3d. From the remaining page and a half of the plan there appears *to be* transferred to the ordinance in substance, these provisions, to wit. 1st. "The said territory and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation." 2d. "To all the acts and ordinances of the United States in Congress assembled, conformable thereto." 3d. "The inhabitants and settlers in the said territory shall be subject to pay their part of the federal debts, contracted, or to be contracted, to be apportioned on them, by Congress, according to the same common rule and measure, by which apportionments thereof shall be made on the other states." 4th. "The legislatures of those districts, or new States shall never interfere with the primary disposal of the soil, by the United States in Congress assembled; nor with any regulations Congress may find necessary, for securing the title to such soil to the bona fide purchasers." 5th. "No tax shall be imposed on lands the property of the United States." 6th. "And in no case shall non-resident proprietors be taxed higher than residents."—It will be observed the provisions 4, 5 and 6, some now view as oppressive to the west, were taken from Mr. Jefferson's plan—The residue of the ordinance of '87 consists of two descriptions, one *original* as the provisons to prevent legislatures enacting laws to impair contracts, provisionally made—to secure to the Indians their rights and property—part of the titles to property made more purely republican and more completely divested of feudality than any other titles in the union were in July, 1787—The *temporary* organization was new—no part of it was in the plan of '84—The other description was selected mainly from the constitution and laws of Massachusetts, as any one may see who knows what American law was in '87—as 1st. Titles to property, by will, by deed, by descent, and by delivery, cited *verbatim* in the 7th Volume of this Abridgement, pages 389—390.—Here it

may be observed that titles to lands once taking root are important, as they are usually *permanent*.—In this case they were planted in 400,000 square miles of territory, and took root as was intended. 2d. All the *fundamental, perpetual articles of compact*, except as below, as 1st. Securing forever religious liberty. 2d. The essential parts of a bill of rights declaring that religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. These selections from the code of Massachusetts, as also the titles to property have created for her an extensive and lasting influence in the West, and of the most republican, liberal and beneficial kind.

The organization, providing officers to select or make, to decide on and execute laws, being *temporary*, was not deemed an important part of the ordinance of '87. Charles Pinckney assisted in striking out a part of this in 1786.

The 6th article of compact, the slave article, is imperfectly understood—Its history is—in 1784 a committee, consisting of Mr. Jefferson, Mr. Chase, and Mr. Howell, reported it, as a part of the plan of 1784. This Congress struck out; only two members south of Pennsylvania supported it—all north of Maryland, present, voted to preserve it, so to exclude slavery. It was imperfect, First, as it admitted slavery till the year 1800. Second, it admitted slavery in very considerable parts of the territory forever, as will appear on a critical examination, especially in the parts owned for ages by French, Canadian and other inhabitants, as their property, provided for only in the ordinance of '87. In this ordinance of '87 slavery is excluded from its date, and forever from every part of the whole "territory of the United States, North West of the River Ohio," over all which the ordinance established government.

The amended slave article, as it is in the ordinance of '87 was added on the author's motion as the Journals shew—was not reported.

In the said 7th Volume published in 1824 full credit is given to Mr. Jefferson and Mr. King, on account of their slave article, too limited—amended in July '87 by extending the ordinance of that date, so the slave article in it, over the whole territory and to take effect from the date. In 1802 the Indian article was made a fundamental part of a Southern compact—The provision as to impairing contracts was afterwards adopted into the constitution of the United States, also into the several state constitutions, and after forty years experience into that of Virginia.

In the great Missouri debate in 1820, &c. one Southern member, at least, viewed this ordinance as a Northern usurpation; especially, as to the six articles of compact. Mr. B. in 1830 claims it as an honor to Virginia and Mr. Jefferson. Col. Carrington, of Virginia, as chairman, of the committee *pro forma*, reported the ordinance, but formed no part of it. Of late years this ordinance has been made a subject of particular importance, as proving the authors of it have afforded essential means in promoting the prosperity and rapid growth of the West—It was found in the great Missouri debate the Southern attempt to run it down would not do. As a western Senator said, in that debate, in Congress, it had been the cloud by day and a pillar of fire by night in settling the country—Others to the same purpose. On this and some other discoveries, this Northern usurpation, as Charles Pinckney viewed it, is now claimed as a Southern production to prove Southern friendship to the West—also to prove even in '87 the East did nothing in building up the West. In this point of view the East will

not readily yield its just claim in that business—a claim not denied for 40 years and more.

On the whole, if there be any praise or any blame in this ordinance; especially in the titles to property and in the *permanent* parts; so the most important, it belongs to Massachusetts; as one of her members formed it and furnished the matter with the exceptions, following. First, he was assisted in the committee of '85 in the *temporary* organization; almost solely by Mr. C. Pinkney, who did so little he felt himself at liberty to condemn this ordinance in that debate. Secondly, the author took from Mr. Jefferson's resolve of '84 in substance the said six provisions in the fourth article of compact as above stated. Thirdly, he took the words of the slave article from Mr. King's motion made in 1785, and extended its operation, as to time, and extent of territory, as is above mentioned—as to matter his invention furnished the provisions respecting impairing contracts and the Indian security, and some other smaller matters, the residue, no doubt, he selected from existing laws, &c. In regard to the *matter* of this note, it is a portion of American law properly and conveniently placed in this appendix.—The *particular form* of this note is in answer to many requests, lately made, by members of Congress and others to be informed respecting the formation, the detail and authorship of this ordinance, which in forty years has so often restrained insolvent acts, stop laws, and other improper legislation impairing contracts.

NOTE B.

As in the foregoing pages, many States and public bodies and public men, are brought into view—some of them as being correct and some not; it has been thought best to name each, acting, speaking or writing in the case; so that any thing said or done by either, in each case, may be correctly ascribed to the real actor, speaker or writer.

NOTE C.

According to Mr. Madison, as cited by Mr. Hayne, the individual states may interpose to arrest the progress of usurpation of the General Government; first "where the violation of the Constitution shall be of a nature dangerous *to the great purposes* for which it was established." 2d. It must be a case "*not obscure or doubtful, but plain and palpable.*" 3d. It must be a case "*stampt with deliberate consideration and final adherence.*" How interpose? Mr. Madison does not say how—therefore we may suppose he meant the states may interpose, in the manner the Constitution directs. If so his opinions are correct. The states did very properly interpose in 1798, as stated above, and effected their purpose.

Mr. Madison's second position states it must be a case not *obscure and doubtful*, but plain and *palpable*. His third position states it must be *stampt with deliberate consideration and final adherence.*

Now, for instance, is the tariff of 1828, a *plain palpable violation of the Constitution?* How stands the evidence? We see how it stands in the preceding pages. One Congress passed the tariff act of 1828, a succeeding Congress supports it. It was executed by the late executive; also is executed by the present, and for any thing that appears it is supported by the whole judiciary, state and federal—and especially, nine state legislatures have given their opinions respecting it—Six of them hold it constitutional and only three unconstitutional; there is no pretence that Mr. Madi-

tion, or even Jefferson taught that one state alone, or even a minority of States has power and right *to decide* an act of Congress is *a plain palpable violation* of the Constitution, so void, and to be resisted rightfully of course. In fact both in the General and State Governments a vast majority hold the act is constitutional—still more though the tariff act of 1816 has existed 14 years, the tariff act of 1824 six years, and that of 1828 above two years—there never has been a convention of the people, or a part of them in their sovereign capacity, formed seriously against it. The dinner parties in S. Carolina heated with wine and party speeches, or any little collection of persons in that state, got up, on party principles, are any thing but such conventions assembled to act on great constitutional questions. Speeches, principally, made by men confessedly borne down and soured in minorities in Congress. These S. Carolina leaders finding the majorities against them even in the *State* Governments, have recourse to the pernicious doctrine that majorities are not to govern. Even Col. Drayton says, that a majority's governing in the ordinary administration of affairs is a mere truism, and Mr. Hayne affirms this, yet he ascribes to the general government the most dangerous and tremendous power. That is, that Congress can exercise *unlimited* power to make new States, at pleasure, on any purchased territory. In what part of the Constitution do we find this *unlimited* power in Congress to make new States at pleasure, on any purchased territory? and if at all, undoubtedly, by a majority, a bare majority.

NOTE D.

Further proof to show the General Government was instituted solely on *American* principles, by the *People*, acting in their sovereign capacity and on *revolutionary* principles; as early as Sept. 5, 1774; having its powers enlarged May 10, '75, and *before* the *local* Governments were, or could be formed solely on those principles.

2d. That the General Government exercised by common consent, national powers, as before stated in its session of '74, and in its May session of '75, and even before July '75 exercised by such consent, nearly every kind of power it did before 1789.

3d. That this Government, so created, *de novo*, existing independent of the king and parliament, their governor, officers and laws, by its single act, July 4, '76, made the 13 United *Colonies*, 13 free and independent *States*, and then *constitutionally* and in a *pleadable* form they were separated from their *parent* Government, and then was absolved their allegiance from the British crown. 4th. That the General Government, thus existing suffered no change by July 4, '76—hence its members, in Congress; all its officers, civil, and military, and all its commissions, given, and laws enacted, *before*, continued in full force, *after* July 4, '76; as they would have done, if then no independence had been declared. 5th. That, by it, the *States* were created, and have risen under it, in the acknowledged subordination to it. 6. That the 13 colonies did, constitutionally, remain *British* colonies, owing allegiance to the King, until separated, and made States, July 4, '76; as the French treaties remained in force and form until Congress declared it then void in 1798, though before violated by France; hence, while so colonies, they could not make *a federative compact*. Nor did they make one, *complete* till March 1, 1781. June 6, 1776, Congress resolved on independence, and on the 11th begun to prepare the form of a confederation, to be entered

into, between the colonies. July 2d, New Jersey, and 5th '76, Virginia adopted state constitutions on the general recommendation of Congress. From that moment all confined their ideas of *federative compact* to the confederation. July 2d, '76, New Jersey made a constitution for a *colony*, not for a *state*.

Further proof. In May and June, '75, Congress prohibited exports to Quebec, Nova Scotia, &c., then and subsequently regulated exports, and forbid the invasion of Canada.—On application of the colonies, Congress advised to form Governments, during the contest existing. A convention in Massachusetts stated to Congress the evils she felt for want of a regular Government and requested Congress to name a plan of one. To prepare the way, Congress resolved, that no obedience was due to the act of parliament, altering her charter-government, and that the offices of the King's governors, &c. were vacant, and then advised that letters be sent to her towns, to elect a council, to supply the places of the old council and of the King's Governors, &c. A council was so elected, and with a house of representatives, first met July 19, 1775, and enacted laws, and in them recognised the King's reign, and continued to do so to July, '76. New Hampshire, on such advice, early in '75, made a similar constitution—so did several other colonies, the plan named by Congress, being general, Congress forbid supplies to the British forces—appointed a national [illegible]—ordered many troops to be raised; fixed their organization, pay, &c.—appointed Washington commander in chief; and many other generals and officers—commissioned them, and those, previously in service, and conducted the war in all respects, and the affairs with the Indians—issued two millions of dollars in bills of credit and soon after three millions; apportioned, for redemption on colonies and *directed* the Provincial assemblies, or conventions, to provide sinking funds, &c.—Established rules and regulations for the government of the army, &c. Thus the General Government, even before July, 1775, exercised, by common consent, all these and other powers; and was organized in the form in which it continued till 1789.

It also appears in the Journals, June 21, '75, that county delegates in Virginia had elected Mr. Jefferson a member of Congress; and June 5, '75, the general assembly (representatives branch,) had approved the choice, recognizing the King's reign, proving there was then no *regular* government in Virginia, and that the assembly recognised the king, &c. as the case then was in Massachusetts. Later and more especially was his constitutional power recognised in New York. April 20, 1777, her constitution was adopted. In that, it is declared that the King's grants of land in New York, made before the fourteenth day of October, 1775, are valid. This shows New York understood the war did not annul his constitutional power in the colonies. Till independence was declared, the colony *governments, constitutionally*, remained, entangled with the King and parliament and their officers; owing to him allegiance.—July 4, 1776, Congress *designedly*, as above, named them *colonies—colonies* must have a *parent* state to be *colonies;* that parent state was Great Britain. Thence Congress declared "these united colonies *are* absolved from all allegiance to the British crown," and all political connection *is* dissolved. They did not resist before July 4, '76, because they were *not* colonies; but because they *were colonies* oppressed, and threatened to be more oppressed, by the parent government. They could make no federative compact till com-

pletely separate, as was the American head; they could have no *state rights* till made *states*. The states when created were *new creatures*, and the government of each, when formed by the people, revived from them, *de novo* such of their natural sovereign power, as had not, *previously*, been granted, by them, to Congress.

July 18, 1775, Congress resolved it be recommended to the *inhabitants* of all the limited *English* colonies in North America, that all able bodied effective men, between 16 and 50 years of age, in each colony, immediately, *form themselves* into regular companies of militia. Congress did not then *recommend*, but *prescribed* the plan and organization, &c. In this great work, Congress called on *the inhabitants* to act, named the colonies *English*, and called on the able bodied men *to form themselves; trusting* only the smaller parts to the then imperfect assemblies, conventions or committees of safety, often employed by Congress, till proper state governments were formed. July 26, '75, Congress established the post office. 31, recognised the rights of the *chartered* colonies, speaking of them as *British* colonies, oppressed. In the Journals of Congress, September 13, it appears, a convention in Virginia, August 11, '75, elected members of Congress, and re-electing Mr. Jefferson, the people had elected two months before, shewing there was not in Virginia, till August, '75, even a convention to choose members of Congress. October 6, '75, Congress *directed* the provincial convention of New York, to make Hudson River defensible. December 5, regulated captures—26, resolved, "that the thirteen United colonies be pledged for the redemption of the bills of credit so directed to be limited"—(3 millions to be issued)—on the same day, limited suits against continental soldiers. April 6, '76, resolved, "that no slaves be imported into any of these united colonies." There was no treason against a state, till it enaeted treason laws, as Massachusetts did in 1777. Further proof.—There was no *federative compact* till March 1, 1781, when the confederation was completed by the accession of Maryland, the thirteenth and last state. Congress took it in hand before independence was declared, considered it almost daily for many weeks after; excluding every idea of *compact* in any other form.

In a word,—American constitutions and laws constitute the General Government, the supreme parent head, made by the *people themselves*, except in the confederation. In that only is found *compact* to any material purposes, and to give to a county or a town, as much right to nullify or separate as a state has. Neither has this right but on *revolutionary* principles, and in *extreme* cases, on which a *parish* in Georgia moved in May, 1775, and its member was received in Congress.

NOTE E.

Revolutionary Pensions.

This important subject is here briefly noticed, mainly, because there grows out of it a great *constitutional* question: an interesting part of American Law; not wholly to be omitted in a work, intended to embrace all parts of it—to wit:—has Congress constitutional power to grant millions to large and mixed bodies of men, who have become poor by bad habits or otherwise, once in the public service, *as charities*, not thought on when they served; and never received as a *just compensation* for their services

or any part thereof? A question, as yet but little examined, and that has no precedent, and may hereafter become deeply interesting, so not to be forgotten. At present it is merely stated, and perhaps may well rest during the exising pensions; as the system has been too far executed to be altered.

As these pensions have some bearing on *State rights*, the main subject of this Appendix, it may now be proper to notice, in a few words, some of their peculiarities:—1st. This charity, 20 millions at least, was granted when the advocates of *State rights* and small federal expenditures were the majority in Congress and the executive. 2d. Was granted to a few only of the sufferers in the revolution. 3d. Not till 34 years after the revolutionary army was discharged, were these pensions granted: So, when the more aged officers and soldiers were, generally dead: as the best life tables shew. 4th. Such pensions, *unexplained*, are a dangerous precedent, as they may be granted, easily varied and extensively misused to the purposes of corrupt influence. 5th. Such pensions may be fraudulently obtained, by concealing property, easily concealed—and by false representations not easily detected. 6th. Unexplained, they are a bad precedent, for the poor of all armies, even the robust and idle poor. But the existing pensions can be so explained as to be a precedent less to be feared; because it can be shewn, and here it is useful to shew concisely, that they originated in popular feelings, and singular inattention. In this way, President Monroe, moved by his good feelings, recommended pensions, &c. A committee of Congress reported, and stated the supposed amount of the pensions, not a tenth part of the real amount. Congress viewing them, as a small matter soon to cease, voted them; influenced more by popular feelings than by true information or constitutional inquiry. Here was the great error. The people, as little informed, and as little calculating, hailed the measure, though some plain farmers, at the time, said it was a thoughtless business. The business proceeded, past much correction, before time and experience discovered how much misunderstood it was. Though such pensions were never thought of till the year 1817, yet the old soldier's want of a shirt, or a shoe, had been near 40 years hourly repeated, whilst silence generally continued as to the perpetual calls for militia services, as to the great bounties and heavy taxes, which almost ruined the owners of moderate and small estates, and drove them, by tens of thousands into the wilderness—no object of history, as is every petty skirmish. 7th. Sound principles and *equal* justice were as much neglected as was true information. The consequence has been, many thousands have been pensioned, either able to support themselves, comfortably, by labour, or the vicious authors of their own poverty, or who extorted the enormous bounties. 8th. These pensions are generally no benefit to the industrious, the correct and best men of that army, because *they* almost, of course, have their own means of living comfortably, and often property, but often a burden, because they are taxed to pension those undeserving thousands. Such, with popular feelings, taking the reins, have overturned many a republic. As probably three fourths of these pensions have been paid, the residue, it may seem, ought to be paid. The object, in this statement, is obtained, if it tend, on future occasions, to produce a better view of *equal* justice, and especially of the great constitutional question stated above.

NOTE F.

In January, 1799, the legislature of Massachusetts, almost unanimously, answered the resolve of Virginia relating to the alien and sedition acts of

Congress. On re-examining the first draft of that answer, and that draft amended, it will fully appear that legislature did not understand Virginia to claim the right, in a single state, or even in a minority of states, constitutionally, to nullify an act of Congress, or to control the General Government; but that Virginia did then, as her conduct has done since, place such right in "the *states*" collectively—a position fully agreed to, with a single explanation; that is, that the states, by their legislatures, or by their conventions control the general government in *the manner* agreed to, and provided for in the constitution---and all this even if the constitution be a *confederacy* in toto—and the states sovereign.

Suppose again, the states of Europe should come into a league fixing the powers and course of conduct of the whole in specified cases, and the league agree to a specified mode and manner of altering the league, and so of controlling the conduct of the whole—on every principle of national law, each and every state would be bound to pursue their mode and manner of altering and controlling, as an essential part of its own compact—should one state or a minority of states attempt to alter and control the whole in any other mode and manner, it would be a breach of compact and a just cause of war—and if one state or a minority of states should say, the majority will not agree so to alter and control—the majority might well and fairly reply you should thought of that before you agreed to the league—and not agreed at all, or in the league you should have reserved the right you now claim.

Suppose an amendment of our Constitution proposed in Congress, or in a convention of the States, and a motion should be made to add a section, giving to a state legislature, or to a state convention, a right solely to judge of and to annul acts of Congress, that is acts of all the states, would not such a motion make even the hot headed blush? nay let the motion extend to the minority—would even a loose headed alien taught sedition in a monarchy, coming here, support such a notion?

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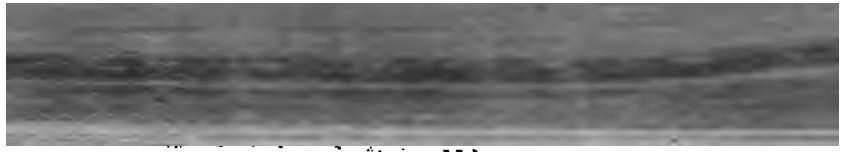

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